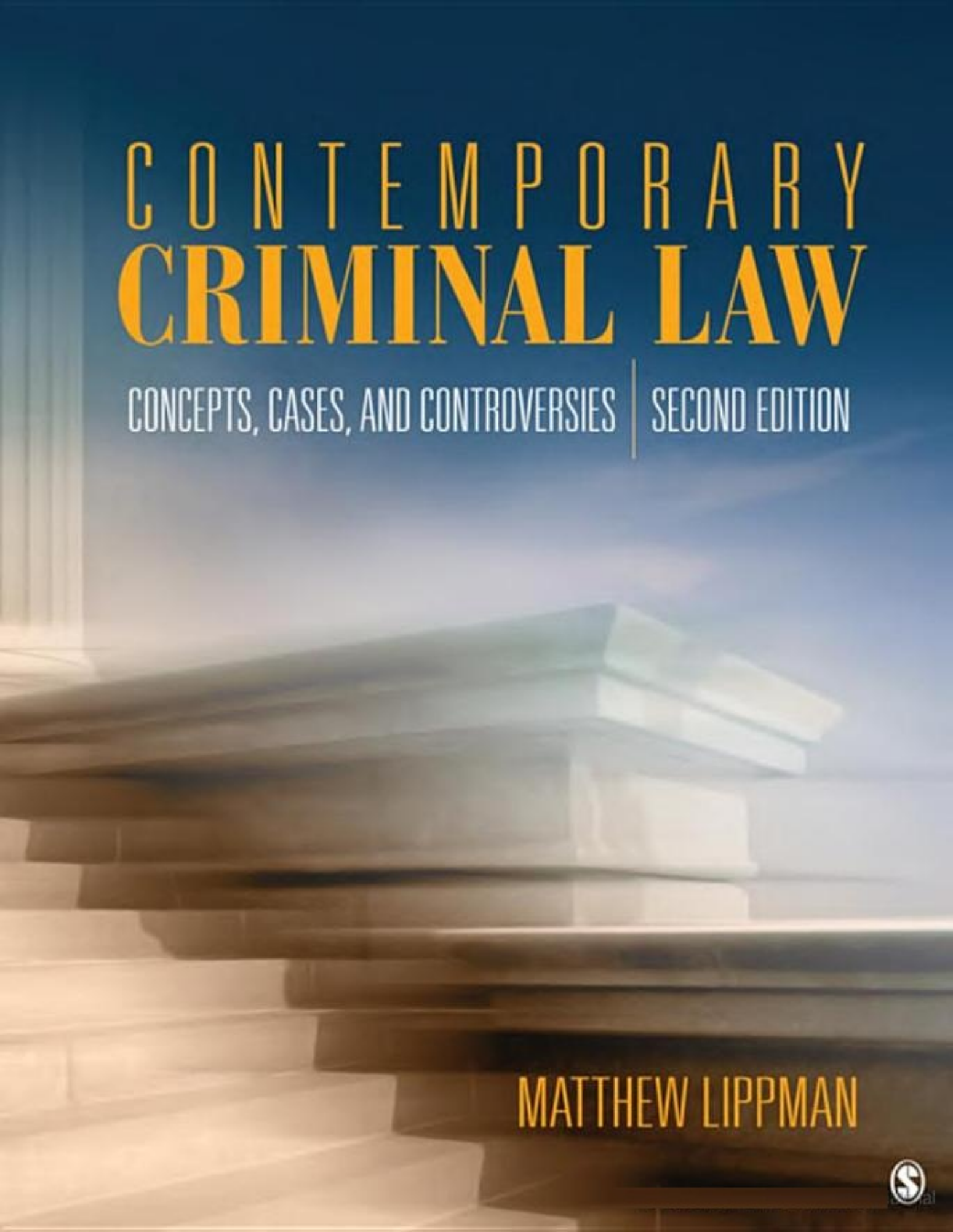
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MATTHEW LIPPMAN

CONTEMPORARY CRIMINAL LAW

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MATTHEW LIPPMAN

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Brief Contents

Detailed Contents

Preface

This book reflects the insights and ideas developed over the course of twenty years of teaching criminal law and criminal procedure to undergraduate criminal justice students. The volume combines the concepts and learning tools found in undergraduate texts with the types of challenging cases and issues that are characteristic of law school casebooks. Each chapter incorporates several features:

- **Essays.** Essays introduce and summarize the chapters and topics.
- **Cases.** Edited cases are accompanied by "Questions for Discussion."
- **Case Notes.** Following the edited case decisions, "Cases and Commentaries" and "You Decide" review exercises are provided. In the "You Decide" sections, actual cases are discussed, and readers are asked to act as judges.
- **State Statutes, the Model Penal Code, and Discussion Boxes.** In these sections, selected statutes and the provisions of the Model Penal Code are reprinted and analyzed. Discussion boxes and graphs supplement the coverage in most chapters.
- **Learning Tools.** Learning tools summarize and reinforce the material. These include introductory vignettes, chapter outlines, questions for discussion following each case, legal equations, chapter review questions, legal terminology lists, bibliographies, and Web-based study aides.

The book provides a contemporary perspective on criminal law that encourages students to actively read and analyze the text. I hope that at the conclusion of the course, students will have mastered the substance of criminal law and have developed the ability to understand and to creatively apply legal rules. My hope is that students come to appreciate that criminal law is dynamic and evolutionary and is not merely a static and mechanical set of rules.

The Case Method

One of my aims is to provide a book that students find interesting and instructors consider educationally valuable. I have found that undergraduates enjoy and easily absorb material taught through the case method. In my experience, learning is encouraged when students are presented with concrete factual situations that illustrate legal rules. The case method also lends itself to an interactive educational environment in which students engage in role playing or apply legal precedents to novel factual scenarios. The case method has the additional benefit of assisting students to refine their skills in critical reading and analysis and in logical thinking.

The cases in the text are organized to enhance learning and comprehension. The decisions have been edited to emphasize the core components of the judgments, and technicalities have been kept to a minimum. Each case is divided into **Facts, Issue**, **Reasoning,** and **Holding**. I strongly believe in the educational value of factual analysis and have included a fairly full description of the facts. The textbook highlights the following:

- **Classic Cases.** The book includes various classic cases that are fundamental to the study of criminal law as well as cases that provide a clear statement of the law.

- **Contemporary Cases.** I have incorporated contemporary cases that reflect our increasingly diverse and urbanized society. This includes cases that address the issues of carjacking, computer crime, drugs, gangs, stalking, terrorism, white-collar crime, cultural diversity, and animal rights. Attention is also devoted to gender, race, domestic violence, and hate crimes.
- **Legal Issues.** The vast majority of the decisions have been selected to raise important and provocative legal issues. For instance, students are asked to consider whether the law should be expanded to provide that a vicious verbal attack constitutes adequate provocation for voluntary manslaughter.
- **Facts.** In other instances, the cases illustrate the challenge of applying legal rules. For example, decisions present the difficulty of distinguishing between various grades of homicide and the complexity of determining whether an act constitutes a criminal attempt.
- **Public Policy.** I have found that among the most engaging aspects of teaching criminal law are the questions of public policy, law, and morality that arise in various cases. The book constantly encourages students to reflect on the impact and social context of legal rules and raises issues throughout, such as whether we are justified in taking a life to preserve several other lives under the law of necessity.

Chapter Organization

Each chapter is introduced by a **vignette.** This is followed by **Core Concepts and Summary Statements,** which outlines the central points. The **Introduction** to the chapter then provides an overview of the discussion.

The cases are introduced by **essays.** These discussions clearly present the development and elements of the relevant defense, concept, or crime and also include material on public policy considerations. Each case is introduced by a **question** that directs students to the relevant issue.

At the conclusion of the case, **questions for discussion** ask students to summarize and analyze the facts and legal rule. These questions, in many instances, are followed by **Cases and Comments** that expand on the issues raised by the edited case in the textbook. There is also a feature titled **You Decide** that provides students with the opportunity to respond to the facts of an actual case. The "answers" are available on the book's **Web site** at **www.sagepub.com/lippmanccl2e.**

The essays are often accompanied by excerpts from **state statutes** and an analysis of the **Model Penal Code.** These provide students with an appreciation of the diverse approaches to criminal statutes. The discussion of each defense or crime concludes with a **legal equation** that clearly presents the elements of the defense or crime.

The chapters close with a **Chapter Summary** that outlines the important points. This is followed by **Chapter Review Questions**, **Legal Terminology,** a **Web exercise,** and a **Bibliography**. A **Glossary** appears at the end of the book. Additional learning tools are included on the Web site.

Most of the chapters also include **Crime in the News.** This is a brief discussion of legal developments and cases that students have likely encountered in the media. The purpose is to highlight contemporary issues and debates and to encourage students to consider the impact of the media in shaping our perceptions. Several chapters also include **Crime on the Streets,** which employs graphs to illustrate the frequency of various criminal offenses or other pertinent information. This is intended to give students a sense of the extent of crime in the United States and to connect the study of criminal law to the field of criminal justice. The Web site provides resources that enable instructors to augment the material in the book and to assist in student learning.

Organization of the Text

The textbook provides broad coverage. This enables instructors to select from a range of alternative topics. You will also find that subjects are included that are not typically addressed. The discussion of rape, for instance, includes "withdrawal of consent" and "rape shield statutes." Expanded coverage is provided on topics such as sentencing, homicide, white-collar crime, and terrorism.

The textbook is organized into seven parts. We begin with the nature, purpose, and constitutional context of criminal law as well as sentencing and then cover the basic elements of criminal responsibility and offenses. The next parts of the textbook discuss crimes against the person and

crimes against property and business. The book concludes with discussions of crimes against public morality and crimes against the state.

- **Nature, Purpose, and Constitutional Context of Criminal Law:** Chapter 1 discusses the nature, purpose, and function of criminal law. This introduction to criminal law is followed by an appendix on reading legal cases. Chapter 2 covers the constitutional limits on criminal law, including due process, equal protection, freedom of speech, and the right to privacy. Chapter 3 provides an overview of punishment and sentencing and discusses the Eighth Amendment prohibition on cruel and unusual punishment.
- **Principles of Criminal Responsibility:** This part covers the foundation elements of a crime. Chapter 4 discusses criminal acts and Chapter 5 is concerned with criminal intent, concurrence, and causation.
- **Parties, Vicarious Liability, and Inchoate Crimes:** The third part of the textbook discusses the scope of criminal responsibility. Chapter 6 discusses parties to crime and vicarious liability. Chapter 7 covers the inchoate crimes of attempt, conspiracy, and solicitation.
- **Criminal Defenses:** The fourth part of the text discusses defenses to criminal liability. Chapter 8 outlines justifications and Chapter 9 encompasses excuses.
- **Crimes Against the Person:** The fifth part focuses on crimes against the person. Chapter 10 is concerned with criminal sexual conduct, assault and battery, kidnapping, and false imprisonment. Chapter 11 provides a lengthy treatment of homicide.
- **Crimes Against Habitation, Property, and White-Collar Crime:** Chapter 12 covers burglary, trespass, arson, and mischief. These crimes against property were originally conceived as protecting the safety and security of the home. Chapter 13 centers on other crimes against property, including larceny, embezzlement, identity theft, and carjacking. Chapter 14 provides an overview of white-collar crime, commercial offenses that are designed to illegally enhance an individual's income or corporate profits. This chapter covers a range of topics, including environmental crimes, securities fraud, mail and wire fraud, and public corruption.
- **Crimes Against Public Order, Morality, and the State:** Chapter 15 focuses on crimes against public order and morality that threaten the order and stability of the community. The chapter covers a number of topics including disorderly conduct, riot, vagrancy, and efforts to combat homelessness, gangs, and prostitution. Chapter 16 discusses crimes against the state, stressing counterterrorism.

Second Edition

In writing the second edition, I have benefited from the insightful comments of reviewers. I also have drawn on my experience in teaching the text. The changes to the book were adopted following a thorough review of contemporary court decisions and developments. I focused my efforts on sharpening topics that caused students particular problems and resisted changes that did not strengthen the text. The standard was whether a modification assisted in teaching and learning. The primary changes to the text include the following:

- **Cases.** New cases have been added that illuminate important concepts. This includes judgments illustrating the difference between kidnapping and false imprisonment as well as decisions distinguishing between burglary and trespass. Other cases explore the insanity defense, money laundering, strict liability, and terrorism. A number of cases have been placed on the study site. Several cases from the first edition have been edited to highlight important aspects of the decision.
- **Statutory Standard**. Excerpts from state statutes have been added to illustrate contemporary developments in areas such as computer crime.
- **New Material**. Chapters have been updated to maintain the contemporary content and theme of the book and to clarify concepts discussed in the book.
- **You Decide.** Most chapters include several new "You Decide" sections. These problems clarify concepts, illustrate the complexity of legal analysis, and enhance the interactive character of the text.
- **Study Site**. New material has been added to the study site to assist in student learning. You will find a number of interesting cases available on the study site.

Acknowledgments

I am hopeful that the textbook conveys my passion and enthusiasm for the teaching of criminal law and contributes to the teaching and learning of this most fascinating and vital topic. The book has been the product of the efforts and commitment of countless individuals who deserve much of the credit.

Let me first thank those responsible for compiling the state-specific material on the Web site.

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I have two members of my family living in Chicago. My sister, Dr. Jessica Lippman, and niece, Professor Amelia Barrett, remain a source of encouragement and generous assistance. Finally, the book is dedicated to my parents, Mr. and Mrs. S.G. Lippman, who provided me with a love of learning. My late father, S.G. Lippman, practiced law for seventy years in the service of the most vulnerable members of society. He believed that law was the highest calling and never turned away a person in need. Law, for him, was a passionate calling to pursue justice and an endless source of discussion, debate, and fascination.

For my parents and Lidia Janus

The Nature, Purpose, and Function of Criminal Law

1

May the police officers be subjected to prosecution in both state and federal court?

As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the eighteenth to the thirtieth second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the thirty-fifth to the fifty-first second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the fifty-fifth second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. . . . At one-minute-five-seconds (1:05) on the videotape, Briseno, in the District Court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed.

For a deeper look at this topic, visit the study site.

Core Concepts and Summary Statements

Introduction

The criminal law is the foundation of the criminal justice system. The law defines the acts that may lead to an arrest, prosecution, and imprisonment. States punish a range of acts in their criminal codes.

The Nature of Criminal Law

Crime is conduct that, if shown to have taken place, will result in a formal and solemn pronouncement of moral condemnation by the community.

Criminal and Civil Law

The civil law protects the individual rather than the public interest.

The Purpose of Criminal Law

The criminal law prohibits conduct that causes or threatens the public interest; defines and warns people of the acts that are subject to criminal punishment; distinguishes between serious and minor offenses; and imposes punishment to protect society and to satisfy the demands for retribution, rehabilitation, and deterrence.

The Principles of Criminal Law

Basic principles essential for understanding the criminal law include the concepts of criminal acts, criminal intent, the concurrence between acts and intent, causality, responsibility, and defenses.

Categories of Crime

A. Felonies are punishable by death or by imprisonment for more than a year. Other offenses are misdemeanors. Some states provide for minor offenses that do not result in imprisonment; these are referred to as violations or infractions.
B. *Mala in se* crimes are inherently evil; *mala prohibita* crimes are not viewed as inherently evil.
C. Crimes also may be categorized by subject matter; examples are crimes against a person or property.

Sources of Criminal Law

A. There are a number of sources of criminal law ranging from the common law to state and federal statutes to the U.S. and state constitutions.
B. The common law originated in the common customs and practices of the people of England and can be traced to the Norman conquest of England in 1066 A.D. This law was transported to the American colonies.
C. American states in the nineteenth century began to adopt comprehensive criminal codes. States today differ on whether they continue to recognize the common law in areas not addressed by state statutes. Most states no longer recognize the common law, and there are no federal common law crimes.
D. States possess the broad authority to protect the health, safety, welfare, well-being, and tranquility of the community.
E. In 1962, the American Law Institute adopted the Model Penal Code to encourage and guide the uniform drafting and reform of state statutes.
F. The U.S. Constitution assigns various powers to the federal government that form the foundation for the federal criminal code.
G. The U.S. and individual state constitutions establish limits and standards for the criminal law.

Introduction

The criminal law is the foundation of the criminal justice system. The law defines the conduct that may lead to an arrest by the police, trial before the courts, and incarceration in prison. When we think about criminal law, we typically focus on offenses such as rape, robbery, and murder. States, however, condemn a range of acts in their criminal codes, some of which may surprise you. In Alabama, it is a criminal offense to promote or engage in a wrestling match with a bear or to train a bear to fight in such a match.[1] A Florida law states that it is unlawful to possess "any ignited tobacco product" in an elevator.[2] Rhode Island declares that an individual shall be imprisoned for seven years who voluntarily engages in a duel with a dangerous weapon or who challenges an individual to a duel.[3] In Wyoming you can be arrested for skiing while being impaired by alcohol[4] or for opening and failing to close a gate in a fence that "crosses a private road or river."[5] You can find criminal laws on the books in various states punishing activities such as playing dominos on Sunday, feeding an alcoholic beverage to a moose, cursing on a miniature golf course, making love in a car, or performing a wedding ceremony when either the bride or groom is drunk.[6] In Louisiana, you risk being sentenced to ten years in prison for stealing an alligator, whether dead or alive, valued at $1,000.[7]

The Nature of Criminal Law

Are there common characteristics of acts that are labeled as crimes? How do we define a crime? The easy answer is that a **crime** is whatever the law declares to be a criminal offense and punishes with a penalty. The difficulty with this approach is that not all criminal convictions result in a fine or imprisonment. Rather than punishing a **defendant,** the judge may merely warn him or her not to repeat the criminal act. Most commentators stress that the important feature of a crime is that it is an act that is officially condemned by the community and carries a sense of shame and humiliation. Professor Henry M. Hart, Jr. defines crime as "conduct which, if . . . shown to have taken place" will result in the "formal and solemn pronouncement of the moral condemnation of the community."[8]

The central point of Professor Hart's definition is that a crime is subject to formal condemnation by a judge and jury representing the people in a court of law. This distinguishes a crime from acts most people would find objectionable that typically are not subject to state prosecution and official punishment. We might, for instance, criticize someone who cheats on his or her spouse, but we generally leave the solution to the *individuals involved.* Other matters are left to *institutions* to settle; schools generally discipline students who cheat or disrupt classes, but this rarely results in a criminal charge. Professional baseball, basketball, and football leagues have their own private procedures for disciplining players. Most states leave the decision whether to recycle trash to the *individual* and look to *peer pressure* to enforce this obligation.

Criminal and Civil Law

How does the criminal law differ from the **civil law**? The civil law is that branch of the law that protects the individual rather than the public interest. A legal action for a civil wrong is brought by an individual rather than by a state prosecutor. You may sue a mechanic who breaches a contract to repair your car or bring an action against a landlord who fails to adequately heat your apartment. The injury is primarily to you as an individual, and there is relatively little harm to society. A mechanic who intentionally misleads and harms a number of innocent consumers, however, may find himself or herself charged with criminal fraud.

Civil and criminal actions are characterized by different legal procedures. For instance, conviction of a crime requires the high standard of proof beyond a reasonable doubt, although responsibility for a civil wrong is established by the much lower standard of proof by a preponderance of the evidence or roughly fifty-one percent certainty. The high standard of proof in criminal cases reflects the fact that a criminal conviction may result in a loss of liberty and significant damage to an individual's reputation and standing in the community.[9]

The famous eighteenth-century English jurist William Blackstone summarizes the distinction between civil and criminal law by observing that civil injuries are "an infringement . . . of the civil rights which belong to individuals . . . public wrongs, or crimes . . . are a breach and violation of the public rights and duties, due to the whole community . . . in its social aggregate capacity." Blackstone illustrates this difference by pointing out that society has little interest in whether he sues a neighbor or emerges victorious in a land dispute. On the other hand, society has a substantial investment in the arrest, prosecution, and conviction of individuals responsible for espionage, murder, and robbery.[10]

The difference between a civil and criminal action is not always clear, particularly with regard to an action for a **tort**, which is an injury to a person or to his or her property. Consider the drunken driver who runs a red light and hits your car. The driver may be sued in tort for negligently damaging you and your property as well as criminally prosecuted for reckless driving. The purpose of the civil action is to compensate you with money for the damage to your car and for the physical and emotional injuries you have suffered. In contrast, the criminal action punishes the driver for endangering society. Civil liability is based on a preponderance of the evidence standard, while a criminal conviction carries a possible loss of liberty and is based on the higher standard of guilt beyond a reasonable doubt. You may recall that former football star O.J. Simpson was acquitted of murdering Nicole Brown Simpson and Ron Goldman but was later found guilty of wrongful death in a civil court and ordered to compensate the victims' families in the amount of $33.5 million.

The distinction between criminal and civil law proved immensely significant for Kansas inmate Leroy Hendricks. Hendricks was about to be released after serving ten years in prison for molesting two thirteen-year-old boys. This was only the latest episode in Hendricks's almost thirty-year history of indecent exposure and molestation of young children. Hendricks freely conceded that when not confined, the only way to control his sexual urge was to "die."

Upon learning that Hendricks was about to be released, Kansas authorities invoked the Sexually Violent Predator Act of 1994, which authorized the institutional confinement of individuals who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Following a hearing, a jury found Hendricks to be a "sexual predator." The U.S. Supreme Court ruled that Hendricks's continued commitment was a civil rather than criminal penalty, and that Hendricks was not being unconstitutionally punished twice for the same criminal act of molestation. The Court explained that the purpose of the commitment procedure was to detain and to treat Hendricks in order to prevent him from harming others in the future rather than to punish him.[11] Do you think that the decision of the U.S. Supreme Court makes sense?

The Purpose of Criminal Law

We have seen that the criminal law primarily protects the interests of society, and the civil law protects the interests of the individual. The primary purpose or function of the criminal law is to help maintain social order and stability. The Texas criminal code proclaims that the purpose of criminal law is to "establish a system prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate."[12] The New York criminal code sets out the basic purposes of criminal law as follows:[13]

- *Harm.* To prohibit conduct that unjustifiably or inexcusably causes or threatens substantial harm to individuals as well as to society
- *Warning.* To warn people both of conduct that is subject to criminal punishment and of the severity of the punishment
- *Definition.* To define the act and intent that is required for each offense
- *Seriousness.* To distinguish between serious and minor offenses and to assign the appropriate punishments
- *Punishment.* To impose punishments that satisfy the demands for revenge, rehabilitation, and deterrence of future crimes
- *Victims.* To insure that the victim, the victim's family, and the community interests are represented at trial and in imposing punishments

The next step is to understand the characteristics of a criminal act.

The Principles of Criminal Law

The study of **substantive criminal law** involves an analysis of the definition of specific crimes (specific part) and of the general principles that apply to all crimes (general part), such as the defense of insanity. In our study, we will first review the general part of criminal law and then look at specific offenses. Substantive criminal law is distinguished from **criminal procedure**. Criminal procedure involves a study of the legal standards governing the detection, investigation, and prosecution of crime and includes areas such as interrogations, search and seizure, wiretapping, and the trial process. Criminal procedure is concerned with "how the law is enforced"; criminal law involves "what law is enforced."

Professors Jerome Hall[14] and Wayne R. LaFave[15] identify the basic principles that compose the general part of the criminal law. Think of the general part of the criminal law as the building blocks that are used to construct specific offenses such as rape, murder, and robbery.

- *Criminal Act.* A crime involves an act or failure to act. You cannot be punished for bad thoughts. A criminal act is called *actus reus*.
- *Criminal Intent.* A crime requires a criminal intent or *mens rea*. Criminal punishment is ordinarily directed at individuals who intentionally, knowingly, recklessly, or negligently harm other individuals or property.
- *Concurrence.* The criminal act and criminal intent must coexist or accompany one another.
- *Causation.* The defendant's act must cause the harm required for criminal guilt, death in the case of homicide, and the burning of a home or other structure in the case of arson.
- *Responsibility.* Individuals must receive reasonable notice of the acts that are criminal so as to make a decision to obey or to violate the law. In other words, the required criminal act and criminal intent must be clearly stated in a statute. This concept is captured by the Latin phrase *nullum crimen sine lege, nulla poena sin lege* (no crime without law, no punishment without law).
- *Defenses.* Criminal guilt is not imposed on an individual who is able to demonstrate that his or her criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented him or her from forming a criminal intent).

We now turn to a specific part of the criminal law to understand the various types of acts that are punished as crimes.

Categories of Crime

Felonies and Misdemeanors

There are a number of approaches to categorizing crimes. The most significant distinction is between a **felony** and a **misdemeanor**. A crime punishable by death or by imprisonment for more than one year is a felony. Misdemeanors are crimes punishable by less than a year in prison. Note that whether a conviction is for a felony or misdemeanor is determined by the punishment provided in the statute under which an individual is convicted rather than by the actual punishment imposed. Many states subdivide felonies and misdemeanors into several classes or degrees to distinguish between the seriousness of criminal acts. **Capital felonies** are crimes subject to the death penalty or life in prison in states that do not have the death penalty. The term **gross misdemeanor** is used in some states to refer to crimes subject to between six and twelve months in prison, whereas other misdemeanors are termed **petty misdemeanors**. Several states designate a third category of crimes that are termed **violations** or **infractions**. These tend to be acts that cause only modest social harm and carry fines. These offenses are considered so minor that imprisonment is prohibited. This includes the violation of traffic regulations.

Florida classifies crimes as felonies, misdemeanors, or noncriminal violations. Noncriminal violations are primarily punishable by a fine or forfeiture of property. The following list shows

the categories of felonies and misdemeanors and the maximum punishment generally allowable under Florida law:

- *Capital Felony.* Death or life imprisonment without parole
- *Life Felony.* Life in prison and a $15,000 fine
- *Felony in the First Degree.* Thirty years in prison and a $10,000 fine
- *Felony in the Second Degree.* Fifteen years in prison and a $10,000 fine
- *Felony in the Third Degree.* Five years in prison and a $5,000 fine
- *Misdemeanor in the First Degree.* One year in prison and a $1,000 fine
- *Misdemeanor in the Second Degree.* Sixty days in prison and a $500 fine

The severity of the punishment imposed is based on the seriousness of the particular offense. Florida, for example, punishes as a second-degree felony the recruitment of an individual for prostitution knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution. This same act is punished as a first-degree felony in the event that the person recruited is under fourteen years old or if death results.[16]

Mala In Se and *Mala Prohibita*

Another approach is to classify crime by "moral turpitude" (evil). ***Mala in se*** crimes are considered "inherently evil" and would be evil even if not prohibited by law. This includes murder, rape, robbery, burglary, larceny, and arson. ***Mala prohibita*** offenses are not "inherently evil" and are only considered wrong because they are prohibited by a statute. This includes offenses ranging from tax evasion to carrying a concealed weapon, leaving the scene of an accident, and being drunk and disorderly in public.

Why should we be concerned with classification schemes? A felony conviction can prevent you from being licensed to practice various professions, bar you from being admitted to the armed forces or joining the police, and prevent you from adopting a child or receiving various forms of federal assistance. In some states, a convicted felon is still prohibited from voting, even following release. The distinction between *mala in se* and *mala prohibita* is also important. For instance, the law provides that individuals convicted of a "crime of moral turpitude" may be deported from the United States.

There are a number of other classification schemes. The law originally categorized as **infamous** those crimes that were considered to be deserving of shame or disgrace. Individuals convicted of infamous offenses such as treason (betrayal of the nation) or offenses involving dishonesty were historically prohibited from appearing as witnesses at a trial.

Subject Matter

This textbook is organized in accordance with the subject matter of crimes, the scheme that is followed in most state criminal codes. There is disagreement, however, concerning the classification of some crimes. Robbery, for instance, involves the theft of property as well as the threat or infliction of harm to the victim, and there is a debate about whether it should be considered a crime against property or against the person. Similar issues arise in regards to burglary. Subject matter offenses in descending order of seriousness are as follows:

- *Crimes Against the State.* Treason, sedition, espionage, terrorism (Chapter 16)
- *Crimes Against the Person, Homicide.* Homicide, murder, manslaughter (Chapter 11)
- *Crimes Against the Person, Sexual Offenses, and Other Crimes.* Rape, assault and battery, false imprisonment, kidnapping (Chapter 10)
- *Crimes Against Habitation.* Burglary, arson, trespassing (Chapter 12)
- *Crimes Against Property.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, fraud (Chapters 13 and 14)
- *Crimes Against Public Order.* Disorderly conduct, riot (Chapter 15)
- *Crimes Against the Administration of Justice.* Obstruction of justice, perjury, bribery
- *Crimes Against Public Morals.* Prostitution, obscenity (Chapter 15)

The book also covers the general part of criminal law, including the constitutional limits on criminal law (Chapter 2), sentencing (Chapter 3), criminal acts (Chapter 4), criminal intent (Chapter 5), the scope of criminal liability (Chapters 6 and 7), and defenses to criminal liability (Chapters 8 and 9).

Sources of Criminal Law

We now have covered the various categories of criminal law. The next question to consider is this: What are the sources of the criminal law? How do we find the requirements of the criminal law? There are a number of sources of the criminal law in the United States:

- *English and American Common Law.* These are English and American judge-made laws and English acts of Parliament.
- *State Criminal Codes*. Every state has a comprehensive written set of laws on crime and punishment.
- *Municipal Ordinances*. Cities, towns, and counties are typically authorized to enact local criminal laws, generally of a minor nature. These laws regulate the city streets, sidewalks, and buildings and concern areas such as traffic, littering, disorderly conduct, and domestic animals.
- *Federal Criminal Code*. The U.S. government has jurisdiction to enact criminal laws that are based on the federal government's constitutional powers, such as the regulation of interstate commerce.
- *State and Federal Constitutions*. The U.S. Constitution defines treason and together with state constitutions establishes limits on the power of government to enact criminal laws. A criminal statute, for instance, may not interfere with freedom of expression or religion.
- *International Treaties*. International treaties signed by the United States establish crimes such as genocide, torture, and war crimes. These treaties, in turn, form the basis of federal criminal laws punishing acts such as genocide and war crimes when Americans are involved. These cases are prosecuted in U.S. courts.
- *Judicial Decisions*. Judges write decisions explaining the meaning of criminal laws and determining whether criminal laws meet the requirements of state and federal constitutions.

At this point, we turn our attention to the common law origins of American criminal law and to state criminal codes.

The Common Law

The English *common law* is the foundation of American criminal law. The origins of the common law can be traced to the Norman conquest of England in 1066. The Norman king, William the Conqueror, was determined to provide a uniform law for England and sent royal judges throughout the country to settle disputes in accordance with the common customs and practices of the country. The principles that composed this common law began to be written down in 1300 in an effort to record the judge-made rules that should be used to decide future cases.

By 1600, a number of **common law crimes** had been developed, including arson, burglary, larceny, manslaughter, mayhem, rape, robbery, sodomy, and suicide. These were followed by criminal attempt, conspiracy, blasphemy, forgery, sedition, and solicitation. On occasion, the king and Parliament issued decrees that filled the gaps in the common law, resulting in the development of the crimes of false pretenses and embezzlement. The distinctive characteristic of the common law is that it is for the most part the product of the decisions of judges in actual cases.

The English civil and criminal common law was transported to the new American colonies and formed the foundation of the colonial legal system that in turn was adopted by the thirteen original states following the American Revolution. The English common law was also recognized by each state subsequently admitted to the Union; the only exception was Louisiana, which followed the French Napoleonic Code until 1805 when it embraced the common law.[17]

State Criminal Codes

States in the nineteenth century began to adopt comprehensive written criminal codes. This movement was based on the belief that in a democracy the people should have the opportunity to know the law. Judges in the common law occasionally punished an individual for an act that had never before been subjected to prosecution. A defendant in a Pennsylvania case was convicted of making obscene phone calls despite the absence of a previous prosecution for this offense. The court explained that the "common law is sufficiently broad to punish . . . although there may be no exact precedent, any act which directly injures or tends to injure the public."[18] There was the additional argument that the power to make laws should reside in the elected legislative representatives of the people rather than in unelected judges. As Americans began to express a sense of independence, there was also a strong reaction against being so clearly connected to the English common law tradition, which was thought to have limited relevance to the challenges facing America. As early as 1812, the U.S. Supreme Court proclaimed that federal courts were required to follow the law established by Congress and were not authorized to apply the common law.

States were somewhat slower than the federal government to abandon the common law. In a Maine case in 1821, the accused was found guilty of dropping the dead body of a child into a river. The defendant was convicted even though there was no statute making this a crime. The court explained that "good morals" and "decency" all forbid this act. State legislatures reacted against these types of decisions and began to abandon the common law in the mid-nineteenth century. The Indiana Revised Statutes of 1852, for example, proclaims that "[c]rimes and misdemeanors shall be defined, and punishment fixed by statutes of this State, and not otherwise."[19]

Some states remain **common law states**, meaning that the common law may be applied where the state legislature has not adopted a law in a particular area. The Florida criminal code states that the "common law of England in relation to crimes, except so far as the same relates to the mode and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject." Florida law further provides that where there is no statute, an offense shall be punished by fine or imprisonment but that the "fine shall not exceed $500, nor the term of imprisonment 12 months."[20] Missouri and Arizona are also examples of common law states. These states' criminal codes, like that of Florida, contain a **reception statute** that provides that the states "receive" the common law as an unwritten part of their criminal law. California, on the other hand, is an example of a **code jurisdiction**. The California criminal code provides that "no act or omission . . . is criminal or punishable, except as prescribed or authorized by this code."[21] Ohio and Utah are also code jurisdiction states. The Utah criminal code states that common law crimes "are abolished and no conduct is a crime unless made so by this code . . . or ordinance."[22]

Professor LaFave observes that courts in common law states have recognized a number of crimes that are not part of their criminal codes, including conspiracy, attempt, solicitation, uttering gross obscenities in public, keeping a house of prostitution, cruelly killing a horse, public inebriation, and false imprisonment.[23]

You also should keep in mind that the common law continues to play a role in the law of code jurisdiction states. Most state statutes are based on the common law, and courts frequently consult the common law to determine the meaning of terms in statutes. In the well-known California case of *Keeler v. Superior Court,* the California Supreme Court looked to the common law and determined that an 1850 state law prohibiting the killing of a "human being" did not cover the "murder of a fetus." The California state legislature then amended the murder statute to punish "the unlawful killing of a human being, or a fetus."[24] Most important, our entire approach to criminal trials reflects the common law's commitment to protecting the rights of the individual in the criminal justice process.

State Police Power

Are there limits on a state's authority to pass criminal laws? Could a state declare that it is a crime to possess fireworks on July Fourth? State governments possess the broad power to promote the public health, safety, and welfare of the residents of the state. This wide-ranging **police power** includes the "duty . . . to protect the well-being and tranquility of a community" and to "prohibit

acts or things reasonably thought to bring evil or harm to its people."[25] An example of the far-reaching nature of the state police power is the U.S. Supreme Court's upholding of the right of a village to prohibit more than two unrelated people from occupying a single home. The Supreme Court proclaimed that the police power includes the right to "lay out zones where family values, youth values, the blessings of quiet seclusion, and clean air make the area a sanctuary for people."[26]

State legislatures in formulating the content of criminal codes have been profoundly influenced by the Model Penal Code.

The Model Penal Code

People from other countries often ask how students can study the criminal law of the United States, a country with fifty states and a federal government. The fact that there is a significant degree of agreement in the definition of crimes in state codes is due to a large extent to the **Model Penal Code**.

In 1962, the American Law Institute (ALI), a private group of lawyers, judges, and scholars, concluded after several years of study that despite our common law heritage, state criminal statutes radically varied in their definition of crimes and were difficult to understand and poorly organized. The ALI argued that the quality of justice should not depend on the state in which an individual was facing trial and issued a multivolume set of model criminal laws, *The Proposed Official Draft of the Model Penal Code*. The Model Penal Code is purely advisory and is intended to encourage all fifty states to adopt a single uniform approach to the criminal law. The statutes are accompanied by a commentary that explains how the Model Penal Code differs from existing state statutes. Roughly thirty-seven states have adopted some of the provisions of the Model Penal Code, although no state has adopted every single model law. The states that most closely follow the code are New Jersey, New York, Pennsylvania, and Oregon. As you read this book, you may find it interesting to compare the Model Penal Code to the common law and to state statutes.[27]

This book primarily discusses state criminal law. It is important to remember that we also have a federal system of criminal law in the United States.

Federal Statutes

The United States has a federal system of government. The states granted various powers to the federal government that are set forth in the U.S. Constitution. This includes the power to regulate interstate commerce, to declare war, to provide for the national defense, to coin money, to collect taxes, to operate the post office, and to regulate immigration. The Congress is entitled to make "all Laws which shall be necessary and proper" for fulfilling these responsibilities. The states retain those powers that are not specifically granted to the federal government. The Tenth Amendment to the Constitution states that the powers "not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Constitution specifically authorizes Congress to punish the counterfeiting of U.S. currency, piracy and felonies committed on the high seas, and crimes against the "Law of Nations" as well as to make rules concerning the conduct of warfare. These criminal provisions are to be enforced by a single Supreme Court and by additional courts established by Congress.

The **federal criminal code** compiles the criminal laws adopted by the U.S. Congress. This includes laws punishing acts such as tax evasion, mail and immigration fraud, bribery in obtaining a government contract, and the knowing manufacture of defective military equipment. The **Supremacy Clause** of the U.S. Constitution provides that federal law is superior to a state law within those areas that are the preserve of the national government. This is termed the **preemption doctrine**.

Several recent court decisions have held that federal criminal laws have unconstitutionally encroached on areas reserved for state governments. This reflects a trend toward limiting the federal power to enact criminal laws. For instance, the U.S. government, with the **Interstate Commerce Clause**, has interpreted its power to regulate interstate commerce as providing the authority to criminally punish harmful acts that involve the movement of goods or individuals across state lines. An obvious example is the interstate transportation of stolen automobiles.

In the past few years, the U.S. Supreme Court has ruled several of these federal laws unconstitutional based on the fact that the activities did not clearly affect interstate commerce or involve

the use of interstate commerce. In 1995, the Supreme Court ruled in *United States v. Lopez* that Congress violated the Constitution by adopting the Gun Free School Zones Act of 1990, which made it a crime to have a gun in a local school zone. The fact that the gun may have been transported across state lines was too indirect a connection with interstate commerce on which to base federal jurisdiction.[28]

In 2000, the Supreme Court also ruled unconstitutional the U.S. government's prosecution of an individual in Indiana who was alleged to have set fire to a private residence. The federal law made it a crime to maliciously damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. The Supreme Court ruled that there must be a direct connection between a building and interstate commerce and rejected the government's contention that it is sufficient that a building is constructed of supplies or serviced by electricity that moved across state lines or that the owner's insurance payments are mailed to a company located in another state. Justice Ruth Bader Ginsburg explained that this would mean that "every building in the land" would fall within the reach of federal laws on arson, trespass, and burglary.[29]

In 2006, in *Oregon v. Gonzalez,* the Supreme Court held that U.S. Attorney General John Ashcroft lacked the authority to prevent Oregon physicians acting under the state's Death With Dignity Law from prescribing lethal drugs to terminally ill patients who are within six months of dying.[30]

The sharing of power between the federal and state governments is termed **dual sovereignty**. An interesting aspect of dual sovereignty is that it is constitutionally permissible to prosecute a defendant for the same act at both the state and federal levels so long as the criminal charges slightly differ. You might recall in 1991 that Rodney King, an African American, was stopped by the Los Angeles police. King resisted and eventually was subdued, wrestled to the ground, beaten, and handcuffed by four officers. The officers were acquitted by an all-Caucasian jury in a state court in Simi Valley, California, leading to widespread protest and disorder in Los Angeles. The federal government responded by bringing the four officers to trial for violating King's civil right to be arrested in a reasonable fashion. Two officers were convicted and sentenced to thirty months in federal prison and two were acquitted. Later in this chapter, you will be asked to decide whether this "double prosecution" is fair.

We have seen that the state and federal governments possess the power to enact criminal laws. The federal power is restricted by the provisions of the U.S. Constitution that define the limits on governmental power.

Constitutional Limitations

The U.S. Constitution and individual state constitutions establish limits and standards for the criminal law. The U.S. Constitution, as we shall see in Chapter 2, requires that

- a state or local law may not regulate an area that is reserved to the federal government. A federal law may not encroach upon state power.
- a law may only infringe upon the fundamental civil and political rights of individuals in compelling circumstances.
- a law must be clearly written and provide notice to citizens and to the police of the conduct that is prohibited.
- a law must be nondiscriminatory and may not impose cruel and unusual punishment. A law also may not be retroactive and punish acts that were not crimes at the time that they were committed.

The ability of legislators to enact criminal laws is also limited by public opinion. The American constitutional system is a democracy. Politicians are fully aware that they must face elections and that they may be removed from office in the event that they support an unpopular law. As we learned during the unsuccessful effort to ban the sale of alcohol during the prohibition era in the early twentieth century, the government will experience difficulties in imposing an unpopular law on the public.

Of course, the democratic will of the majority is subject to constitutional limitations. A classic example is the Supreme Court's rulings that popular federal statutes prohibiting and punishing flag burning and desecration compose an unconstitutional violation of freedom of speech.[31]

Crime in the News

In 1996, California became one of twelve states to authorize the use of marijuana for medical purposes. (The states are Alaska, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Maryland exempts medical marijuana users from jail sentences.)

California voters passed Proposition 215, the Compassionate Use Act of 1996, which is intended to ensure that "seriously ill" residents of California are able to obtain marijuana. The act provides an exemption from criminal prosecution for doctors who, in turn, may authorize patients and primary caregivers to possess or cultivate marijuana for medical purposes. The California legislation is directly at odds with the federal Controlled Substances Act, which declares it a crime to manufacture, distribute, or possess marijuana. There are more than 100,000 medical marijuana users in California, and roughly one-tenth of one percent of the population uses medical marijuana in the states that collect information on medical marijuana users.

Angel Raich and Diane Monson are two California residents who suffer from severe medical disabilities. Their doctors have found that marijuana is the only drug that is able to alleviate their pain and suffering. Raich's doctor goes so far as to claim that Angel's pain is so intense that she might die if deprived of marijuana. Monson cultivates her own marijuana, and Raich relies on two caregivers who provide her with California-grown marijuana at no cost.

On August 15, 2000, agents from the federal Drug Enforcement Administration (DEA) raided Monson's home and destroyed all six of her marijuana plants. The DEA agents disregarded objections from the Butte County Sheriff's Department and the local California District Attorney's Office that Monson's possession of marijuana was perfectly legal.

Monson and Raich, along with several doctors and patients, refused to accept the destruction of the marijuana plants and asked the U.S. Supreme Court to rule on the constitutionality of the federal government's refusal to exempt medical marijuana users from criminal prosecution and punishment. The case was supported by the California Medical Association and the Leukemia and Lymphoma Society. Raich suffers from severe chronic pain stemming from fibromyalgia, endometriosis, scoliosis, uterine fibroid tumors, rotator cuff syndrome, an inoperable brain tumor, seizures, life-threatening wasting syndrome, and constant nausea. She also experiences extreme chemical sensitivities that result in violent allergic reactions to virtually every pharmaceutical drug. Raich was confined to a wheelchair before reluctantly deciding to smoke marijuana, a decision that led to her enjoying a fairly normal life.

A doctor recommended that Monson use marijuana to treat severe chronic back pain and spasms. She alleges that marijuana alleviates the pain that she describes as comparable to an uncontrollable cramp. Monson claims that other drugs have proven ineffective or resulted in nausea and create the risk of severe injuries to her kidneys and liver. The marijuana reportedly reduces the frequency of Monson's spasms and enables her to continue to work.

The U.S. Supreme Court, in *Gonzalez v. Raich* in 2005, held that the federal prohibition on the possession of marijuana would be undermined by exempting marijuana possession in California and other states from federal criminal enforcement. The Supreme Court explained that the cultivation of marijuana under California's medical marijuana law, although clearly a local activity, frustrated the federal government's effort to control the shipment of marijuana across state lines, because medical marijuana inevitably would find its way into interstate commerce, increase the nationwide supply, and drive down the price of the illegal drug. There was also a risk that completely healthy individuals in California would manage to be fraudulently certified by a doctor to be in need of medical marijuana. Three of the nine Supreme Court judges dissented from the majority opinion. Justice Sandra Day O'Connor observed that the majority judgment "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."

Following the decision, Angel Raich urged the federal government to have some "compassion and have some heart" and not to "use taxpayer dollars to come in and lock us up…we are using this medicine because it is saving our lives." She asked why the federal government was trying to kill her. Opponents of medical marijuana defend the Supreme Court's decision and explain that individuals should look to traditional medical treatment rather than being misled into thinking that marijuana is an effective therapy. They also argue that marijuana is a highly addictive drug that could lead individuals to experiment with even more harmful narcotics.

There were over 820,000 arrests for possession or sale of marijuana in 2006, most of which were carried out by state authorities. The question is whether the federal authorities will use the Supreme Court decision as a justification for arresting individuals growing or possessing medical marijuana. The federal government has adopted a policy of targeting individuals in California accused of growing 1,000 plants or more and has raided over sixty marijuana dispensaries in the state. One California medical marijuana grower who had been prosecuted and convicted by the federal government was released after serving two years of a ten-year sentence for growing medical marijuana plants pending the outcome in *Gonzalez v. Raich.* After the decision, he was ordered back to prison. In 2007, another defendant had his ten-year sentence affirmed by the Ninth Circuit Court of Appeals. Federal judges in a series of cases have refused to permit witnesses or defendants to raise the defense that the medical use of marijuana is lawful under California law.

The California Attorney General, Bill Lockyer, observed that there is a "vast philosophical difference" between the federal government and Californians on the "rights of patients to have access to the medicine they need to survive and lead healthier lives." The early indications are that President Barack Obama will halt federal prosecutions of individuals whose possession or distribution of medical marijuana complies with state law.

Where do you stand on the medical marijuana controversy?

Consider the following factual scenario that is taken from the U.S. Supreme Court's description of the events surrounding the beating of Rodney King.[32]

You Decide

1.1 On the evening of March 2, 1991, Rodney King and two of his friends sat in King's wife's car in Altadena, California, a city in Los Angeles County, and drank malt liquor for a number of hours. Then, with King driving, they left Altadena via a major freeway. King was intoxicated. California Highway Patrol (CHP) officers observed King's car traveling at a speed they estimated to be in excess of 100 mph. The officers followed King with red lights and sirens activated and ordered him by loudspeaker to pull over, but he continued to drive. The Highway Patrol officers called on the radio for help. Units of the Los Angeles Police Department joined in the pursuit, one of them manned by petitioner Laurence Powell and his trainee, Timothy Wind. (The officers are all Caucasian; King is African American. King later explained that he fled because he feared that he would be returned to prison after having been released four months earlier following a year spent behind bars for robbery.)

King left the freeway, and after a chase of about eight miles, stopped at an entrance to a recreation area. The officers ordered King and his two passengers to exit the car and to assume a felony prone position—that is, to lie on their stomachs with legs spread and arms behind their backs. King's two friends complied. King, too, got out of the car but did not lie down. Petitioner Stacey Koon arrived, at once followed by Ted Briseno and Roland Solano. All were officers of the Los Angeles Police Department, and as sergeant, Koon took charge. The officers again ordered King to assume the felony prone position. King got on his hands and knees but did not lie down. Officers Powell, Wind, Briseno, and Solano tried to force King down, but King resisted and became combative, so the officers retreated. Koon then fired Taser darts (designed to stun a combative suspect) into King.

The events that occurred next were captured on videotape by a bystander. As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the eighteenth to the thirtieth second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the thirty-fifth to the fifty-first second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the fifty-fifth second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about ten seconds. Powell began to reach for his handcuffs. (At the sentencing phase, the district court found that Powell no longer perceived King to be a threat at this point.) At one-minute-five-seconds (1:05) on the videotape, Briseno, in the District Court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. Where the baton blows fell and the intentions of King and the officers at various points were contested at trial, but, as noted, petitioners' guilt has been established.

Powell radioed for an ambulance. He sent two messages over a communications network to the other officers that said "oops" and "I haven't [*sic*] beaten anyone this bad in a long time." Koon sent a message to the police station that said: "Unit just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions. Learning that King worked at Dodger Stadium, Powell said to King: "We played a little ball tonight, didn't we Rodney? . . . You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. . . . Yes, we played a little ball and you lost and we won."

Koon, Powell, Briseno, and Wind were tried in California state court on charges of assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge against Powell that resulted in a hung jury. (The jury was composed of ten Caucasians, one Hispanic, and one Asian American.) The verdicts touched off widespread rioting in Los Angeles. More than 40 people were killed in the riots, more than 2,000 were injured, and nearly $1 billion in property was destroyed. (Los Angeles Mayor Tom Bradley declared that there "appears to be a dangerous trend of racially motivated incidents running through at least some segments of the police department," and President George H.W. Bush announced in May that the verdict had left him with a deep sense of personal frustration and anger and that he was ordering the Justice Department to initiate a prosecution against the officers.)

On August 4, 1992, a federal grand jury indicted the four officers, charging them with violating King's constitutional rights under color of law. Powell, Briseno, and Wind were charged with willful use of unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. After a trial in U.S. District Court for the Central District of California, the jury convicted Koon and Powell but acquitted Wind and Briseno. Koon and Powell were sentenced to thirty months in prison. This jury was comprised of nine Caucasians, two African Americans, and one Hispanic. King later won a $3.8 million verdict from the City of Los Angeles. He used some of the money to establish a rap record business.

The issue to consider is whether Officers King and Powell may be prosecuted and acquitted in California state court and then prosecuted in federal court. This seems to violate the prohibition on **double jeopardy** in the Fifth Amendment to the U.S. Constitution, which states that individuals shall not be "twice put in jeopardy of life or limb." Double jeopardy means that an individual should not be prosecuted more than once for the same offense. Without this protection, the government could subject people to a series of trials in an effort to obtain a conviction.

It may surprise you to learn that judges have held that the dual sovereignty doctrine permits the U.S. government to prosecute an individual under federal law who has been acquitted on the state level. The theory is that the state and federal governments are completely different entities and that state government is primarily concerned with punishing police officers and with protecting residents against physical attack, while the federal government is concerned with safeguarding the civil liberties of all Americans. Each of these entities provides a check on the other to ensure fairness for citizens. The evidence introduced in the two prosecutions to establish the police officers' guilt in the *King* case was virtually identical,

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and the federal prosecution likely was brought in response to political pressure. On the other hand, the federal government historically has acted to prevent unfair verdicts, such as the acquittal of members of the Ku Klux Klan charged with killing civil rights workers during the 1960s.

Do you believe that it was fair to subject the Los Angeles police officers to the expense and emotional stress of two trials? As the attorney general to the United States, would you have advised President George H.W. Bush to bring federal charges against the officers following their acquittal by a California jury?

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

Criminal law is the foundation of the criminal justice system. The law defines the acts that may lead to arrest, trial, and incarceration. We typically think about crime as involving violent conduct, but in fact a broad variety of acts are defined as crimes.

Criminal law is best defined as conduct that, if shown to have taken place, will result in the "formal and solemn pronouncement of the moral condemnation of the community." Civil law is distinguished from criminal law by the fact that it primarily protects the interests of the individual rather than the interests of society.

The purpose of criminal law is to prohibit conduct that causes harm or threatens harm to the individual and to the public interests, to warn people of the acts that are subject to criminal punishment, to define criminal acts and intent, to distinguish between serious and minor offenses, to punish offenders, and to ensure that the interests of victims and the public are represented at trial and in the punishment of offenders.

In analyzing individual crimes, we will be concerned with several basic concerns that compose the general part of the criminal law. A crime is composed of a concurrence between a criminal act (*actus reus*) and criminal intent (*mens rea*) and the causation of a social harm. Individuals must be provided with notice of the acts that are criminally condemned in order to have the opportunity to obey or to violate the law. Individuals must also be given the opportunity at trial to present defenses (justifications and excuses) to a criminal charge.

The criminal law distinguishes between felonies and misdemeanors. A crime punishable by death or by imprisonment for more than one year is a felony. Other offenses are misdemeanors. Offenses are further divided into capital and other grades of felonies and into gross and petty misdemeanors. A third level of offenses are violations or infractions, acts that are punishable by fines.

Another approach is to classify crime in terms of "moral turpitude." *Mala in se* crimes are considered "inherently evil," and *mala prohibita* crimes are not inherently evil and are only considered wrong because they are prohibited by statute.

Our textbook categorizes crimes in accordance with the subject matter of the offense, the scheme that is followed in most state criminal codes. This includes crimes against the state, crimes against the person, crimes against habitation, crimes against property, crimes against public order, and crimes against the administration of justice.

There are a number of sources of American criminal law. These include the common law, state and federal criminal codes, the U.S. and state constitutions, international treaties, and judicial decisions. The English common law was transported to the United States and formed the foundation for the American criminal statutes adopted in the nineteenth and twentieth centuries. Some states continue to apply the common law in those instances in which the state legislature has not adopted a criminal statute. In code jurisdiction states, however, crimes only are punishable if incorporated into law.

States possess broad police powers to legislate for the public health, safety, and welfare of the residents of the state. The drafting of state criminal statutes has been heavily influenced by the American Law Institute's Model Penal Code, which has helped ensure a significant uniformity in the content of criminal codes.

The United States has a system of dual sovereignty in which the state governments have provided the federal government with the authority to legislate various areas of criminal law. The Supremacy Clause provides that federal law takes precedence over state law in the areas that the U.S. Constitution explicitly reserves to the national government. There is a trend toward strictly limiting the criminal law power of the federal government. The U.S. Supreme Court, for example, has ruled that the federal government has unconstitutionally employed the Interstate Commerce Clause to extend the reach of federal criminal legislation to the possession of a firearm adjacent to schools.

The authority of the state and federal governments to adopt criminal statutes is limited by the provisions of federal and state constitutions. For instance, laws must be drafted in a clear and nondiscriminatory fashion and must not

impose retroactive or cruel or unusual punishment. The federal and state governments possess the authority to enact criminal legislation only within their separate spheres of constitutional power.

Chapter Review Questions

1. Define a crime.
2. Distinguish between criminal and civil law. Distinguish between a criminal act and a tort.
3. What is the purpose of criminal law?
4. Is there a difference between criminal law and criminal procedure? Distinguish between the specific and general part of the criminal law.
5. List the basic principles that compose the general part of criminal law.
6. Distinguish between felonies, misdemeanors, capital felonies, gross and petty misdemeanors, and violations.
7. What is the difference between *mala in se* and *mala prohibita* crimes?
8. Discuss the development of the common law. What do we mean by common law states and code jurisdiction states?
9. Discuss the nature and importance of the state police power.
10. Why is the Model Penal Code significant?
11. What is the legal basis for federal criminal law? Define the preemption doctrine and dual sovereignty. What is the significance of the Interstate Commerce Clause?
12. What are the primary sources of criminal law? How does the U.S. Constitution limit the criminal law?
13. Why is understanding the criminal law important in the study of the criminal justice system?

Legal Terminology

capital felony
civil law
code jurisdiction
common law crimes
common law states
crime
criminal procedure
defendant
double jeopardy
dual sovereignty
federal criminal code
felony
gross misdemeanor
infamous crimes
infractions
Interstate Commerce Clause
mala in se
mala prohibita
misdemeanor
Model Penal Code
petty misdemeanor
police power
preemption doctrine
reception statutes
substantive criminal law
Supremacy Clause
tort
violation

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. A number of sites contain collections of state and federal laws and links to state criminal cases. As a first step, go to www.findlaw.com, click on Criminal Law, and read about the steps in a criminal case. This is also a good site at which to find the definitions of various crimes. Then explore the site maintained by the Cornell University Law School, and find the criminal law statutes of the state in which you live. You also might want to go to www.lawsource.com.
2. Learn more about the Rodney King case. Would you have convicted the police officers?
3. You may also want to ask yourself whether it is possible for an innocent individual to be convicted. The Innocence Project works to exonerate the wrongfully convicted. Why are individuals wrongfully convicted?
4. Read about medical marijuana laws.

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Appendix

Reading and Briefing Cases

Introduction

A unique aspect of studying criminal law is that you have the opportunity to read actual court decisions. Reading cases will likely be a new experience, and although you may encounter some initial frustrations, in my experience students fairly quickly master the techniques of legal analysis.

The case method was introduced in 1870 by Harvard law professor Christopher Columbus Langdell and is the primary method of instruction in nearly all American law schools. This approach is based on the insight that students learn the law most effectively when they study actual cases. Langdell encouraged instructors to employ a question and answer classroom technique termed the **Socratic method**. The most challenging aspect of this approach involves posing *hypothetical* or fictitious examples that require students to apply the case material to new factual situations.

The study of cases assists you to

- understand the principles of criminal law,
- improve your skills in critical reading and thinking,
- acquaint yourself with legal vocabulary and procedures,
- appreciate how judges make decisions, and
- learn to apply the law to the facts.

The cases in this textbook have been edited to highlight the most important points. Some nonessential material has been omitted to assist you in reading and understanding the material. You may want to read the entire, unedited case in the library or online.

The cases you read are the products of an *adversary system* in which the prosecutors and defense attorneys present evidence and examine witnesses at trial. The evaluation of the facts is the responsibility of the jury or, in the absence of a jury, the judge. A case heard by a judge without a jury is termed a **bench trial**. The adversary system is premised on the belief that truth will emerge from the clash between two dedicated attorneys "zealously presenting their cause."

The lowest courts in the judicial hierarchy are *trial courts*. The proceedings are recorded in **trial transcripts** that recite the selection of jurors, testimony of witnesses, arguments of lawyers, and rulings by the judge. Individuals convicted before a trial court may appeal the guilty verdict to **appellate** (or appeal) **courts**. The cases you read in this book in most instances are the decisions issued by appellate court judges reviewing a guilty verdict entered against a **defendant** at trial. These reviews are based on transcripts and briefs. **Briefs** are lengthy written arguments submitted to the court by the prosecution and defense. The two sides may also have the opportunity to engage in an **oral argument** before the appellate court. In issuing a decision, the appellate court will accept as established those facts that are most favorable to the party that prevailed at the trial court level.

Defendants appealing a verdict by a trial court ordinarily file an appeal with the intermediate court of appeals, which in many states provides the defendant with a new trial or **trial de novo**. The losing party may then file an additional appeal to the state supreme court. The party who is appealing is termed the **appellant**, and the second name is typically the party against whom the appeal is filed or the **appellee**. You also will notice the insertion of *"v."* between the names of the parties, which is an abbreviation for the Latin *versus*.

Individuals who have been convicted and have exhausted their state appeals may file a constitutional challenge or **collateral attack** against their conviction in federal court. The first name in the title is the name of the prisoner bringing the case, or the **petitioner**, and the second name, or **respondent**, is typically the warden or individual in charge of the prison in which the petitioner is incarcerated.

In a collateral attack, an inmate bringing the action files a petition for **habeas corpus** review requesting a federal court to issue an order requiring the state to demonstrate that the petitioner is lawfully incarcerated. The ability of a petitioner to compel the state to demonstrate that he or she has been lawfully detained is one of the most important safeguards for individual liberty and is guaranteed in Article I, Section 9, Clause 2 of the U.S. Constitution.

Federal courts may also preside over criminal cases charging a defendant with a violation of a federal statute. There are three levels of federal courts. First, there are ninety-four district courts, which are the trial courts. Appeals may be taken to the thirteen courts of appeals and ultimately to the U.S. Supreme Court. The U.S. Supreme Court generally may choose whether to review a case. Four of the nine judges must vote to grant a **writ of certiorari** or an order to review the decision of a lower court.

The Structure of Cases

A case is divided into an *introduction* and *judicial opinion*. These two sections have several components that you should keep in mind.

Introduction

The initial portion of a case is divided into title, citation, and identification of the judge.

Title

Cases are identified by the names of the parties involved in the litigation. At the trial level, this typically involves the prosecuting authority (a city, county, state, or the federal government) and the name of the defendant. On direct appeals, the first name refers to the appellant who is bringing the appeal and the second to the appellee who is defending against the appeal. On collateral attack, remember that the parties are termed petitioners and respondents. You will notice that judicial decisions often utilize a shorthand version of a case and refer only to one of the parties, much like calling someone by his or her first or last name.

Citation

Immediately following the names you will find the citation that directs you to the book or **legal reporter** where you can find the case in a law library. Increasingly, cases are also becoming available online. The standard form for citations of cases, statutes, and law journals is contained in *The Bluebook* published by the Harvard Law Review Association.

Judge

The name of the judge who wrote the opinion typically appears at the beginning of the case. An opinion written by a respected judge may prove particularly influential with other courts. The respect accorded to a judge may also be diminished if his or her decisions have frequently been reversed by appellate courts.

Outline

The full, unedited cases in legal reporters typically begin with a list of numbered paragraphs or **head notes** that outline the main legal points in the case. There is also a summary of the case and of the decisions of other courts that have heard the case. These outlines have been omitted from the edited cases reprinted in this book.

Judicial Opinion

The judge's legal discussion is referred to as the opinion, judgment, or decision. The opinion is usually divided into history, facts, and law. These component parts are not always neatly distinguished, and you may have to organize the material in your mind as you read the case.

History

The initial portion of a case typically provides a summary of the decisions of the lower courts that previously considered the case and the statutes involved.

Facts

Each case is based on a set of facts that present a question to be answered by the judge. This question, for instance, may involve whether a defendant acted in self-defense or whether an individual cleaning his or her rifle intentionally or accidentally killed a friend. This question is termed the *issue*. The challenge is to separate the relevant from the irrelevant facts. A **relevant** fact is a fact that assists in establishing the existence or nonexistence of a *material fact* or element of the crime that the government is required to prove beyond a reasonable doubt at trial. For instance, in the gun example, whether the defendant possessed a motive to kill the victim would be relevant in establishing the material element of whether the defendant possessed a specific intent to kill.

Law

The judge then applies the legal rule to the facts and reaches a **holding** or decision. The **reasoning** is the explanation offered by the judge for the holding. Judges also often include comments and observations (in Latin ***obiter dicta***, or comments from the bench) on a wide range of legal and factual concerns that provide important background but may not be central to the holding. These comments may range from legal history to a discussion of a judge's philosophy of punishment.

Judges typically rely on **precedents** or the holdings of other courts. Precedent or *"**stare decisis** et no quieta movere"* literally translates as "to stand by precedent and to stand by settled points." The court may follow a precedent or point out that the case at hand should be distinguished from the precedent and calls for a different rule, which is called a **distinguishing precedent.**

Appellate courts are typically composed of a **multiple judge panel** consisting of three or more judges, depending on the level of the court. The judges typically meet and vote on a case and issue a **majority opinion**, which is recognized as the holding in the case. Judges in the majority may choose to write a **concurring opinion** supporting the majority, which is typically based on slightly different grounds. On occasion, a majority of judges agree on the outcome of a case but are unable to reach a consensus on the reasoning. In these instances there is typically a **plurality opinion** as well as one or more concurring opinions. In cases in which a court issues a plurality opinion, the decisions of the various judges in the majority must be closely examined to determine the precise holding of the case. You may encounter a **per curiam** opinion. This is an opinion that is authored by all the judges on the court

A judge in the minority has the discretion to write a **dissenting opinion**. Other judges in the minority may also issue separate opinions or join the dissenting opinion of another judge. In those instances in which a court is closely divided, the dissenting opinion with the passage of time may come to reflect the view of a majority of the members of the court. The dissent may also influence the majority opinion. The judges in the majority may feel compelled to answer the claims of the dissent or to compromise in order to attract judges who may be sympathetic to the dissent.

You should keep in mind that cases carry different degrees of authority. The decisions of the Ohio Supreme Court possess **binding authority** on lower courts within Ohio. The decision of a lower-level Ohio court that fails to follow precedent will likely be appealed by the losing party and reversed by the appellate court. The decisions of the Ohio Supreme Court, however, are not binding on lower courts outside of Ohio, but may be considered by these other tribunals to possess **persuasive authority**. Of course, precedents are not written in stone, and courts will typically adjust the law to meet new challenges.

As you read the edited cases reprinted in this textbook, you will notice that the cases are divided into various sections. The "facts" of the case and the "issue" to be decided by the court are typically followed by the court's "reasoning" or justification and "holding" or decision. A number of questions appear at the end of the case to help you understand the opinion.

Briefing a Case

Your instructor may ask you to **brief** or summarize the main points of the cases reprinted in this textbook. A student brief is a concise, shorthand written description of the case and is intended to assist you in *understanding* and *organizing* the material and *in preparing for class and examinations*. A brief generally includes several standard features. These, of course, are only broad guidelines, and there are differing opinions on the proper form of a brief. Bear in mind that a particular case that you are reading may not be easily reduced to a standard format.

1. *The Name of the Case and the Year the Case Was Decided.* The name of the case will help you in organizing your class notes. Including the year of decision places the case in historical context and alerts you to the possibility that an older decision may have been revised in light of modern circumstances.

2. *The State or Federal Court Deciding the Case and the Judge Writing the Decision.* This will assist you in determining the place of the court in the judicial hierarchy and whether the decision constitutes a precedent to be followed by lower-level courts.
3. *Facts*. Write down the relevant facts. You should think of this as a story that has a factual beginning and conclusion. The best approach is to put the facts into your own words. *Pay particular attention to*
   a. the background facts leading to the defendant's criminal conduct;
   b. the defendant's criminal act, intent, and motives; and
   c. the relevant facts as distinguished from the irrelevant facts.
4. *Criminal Charge*. Identify the crime with which the defendant is charged and the text of the relevant criminal statute.
5. *The Issue That the Court Is Addressing in the Case*. This is customarily in the form of a question in the brief and typically is introduced by the word "whether." For instance, the issue might be "whether section 187 of the California criminal code punishing the unlawful killing of a human being includes the death of a fetus."
6. *Holding*. Write down the legal principle formulated by the court to answer the question posed by the issue. This requires only a statement that the "California Supreme Court ruled that section 187 does not include a fetus."
7. *Reasoning*. State the reasons that the court provides for the holding. Note the key precedents the court cites and relies on in reaching its decision. Ask yourself whether the court's reasoning is logical and persuasive.
8. *Disposition*. An appellate court may *affirm* and uphold the decision of a lower court or *reverse* the lower court judgment. In addition, a lower court's decision may be *reversed in part and affirmed in part.* Lastly the appellate court may *reverse* the lower court and *remand* or return the case for additional judicial action. Take the time to understand the precise impact of the court decision.
9. *Concurring and Dissenting Opinions*. Note the arguments offered by judges in concurring and dissenting opinions.
10. *Public Policy and Psychology.* Consider the impact of the decision on society and the criminal justice system. In considering a court decision, do not overlook the psychological, social, and political factors that may have affected the judge's decision.
11. *Personal Opinion*. Sketch your own judicial opinion and note whether you agree with the holding of the case and the reasoning of the court.

Approaching the Case

You will most likely develop a personal approach to reading and briefing cases. You might want to keep the following points in mind:

- *Skim the case*. This will enable you to develop a sense of the issue, facts, and holding of the case.
- *Read the case slowly a second time*. You may find it helpful in the beginning to read the case out loud and write notes in the margin.
- *Write down the relevant facts in your own words.*
- *Identify the relevant facts, issues, reasoning, and holding. You should not merely mechanically copy the language of the case.* Most instructors suggest that you express the material in your own words in order to improve your understanding. You should pay careful attention to the legal language. For instance, there is a significant difference between a statute that provides that an individual who "reasonably believes" that he or she is being attacked is entitled to self-defense, and a statute that provides that an individual who "personally believes" that he or she is being attacked is entitled to self-defense. The first is an objective test measured by a "reasonable person," and the second is a "subjective test" measured by the victim's personal perception. Can you explain the difference? You should incorporate legal terminology into your brief. The law, like tennis or music, possesses a distinctive vocabulary that is used to express and communicate ideas.

- *Consult the glossary or a law dictionary for the definition of unfamiliar legal terms, and write down questions that you may have concerning the case.*
- *The brief should be precise and limited to essential points. You should bring the brief to class and compare your analysis to the instructor's.* Modify the brief to reflect the class discussion, and provide space for insights developed in class.
- *Consider that each case is commonly thought of as "standing for a legal proposition."* Some instructors suggest that you write the legal rule contained in the case as a "banner" across the first page of the brief.
- *Consider why the case is included in the textbook and how the case fits into the general topic covered in the chapter. Remain an active and critical learner, and think about the material you are reading.* You should also consider how the case relates to what you learned earlier in the course. Bring a critical perspective to reading the case, and resist mechanically accepting the court's judgment. Keep in mind that there are at least two parties involved in a case, each of whom may have a persuasive argument. Most important, remember that briefing is a learning tool; it should not be so time consuming that you fail to spend time understanding and reflecting on the material.
- *Consider how the case may relate to other areas you have studied.* A case on murder may also raise interesting issues concerning criminal intent, causality, and conspiracy. Thinking broadly about a case will help you integrate and understand criminal law.
- *Outline the material.* Some instructors may suggest that you develop an outline of the material covered in class. This can be used to assist you in preparing for examinations.

Locating Cases

The names of the cases are followed by a set of numbers and alphabetical abbreviations. These abbreviations refer to various legal reporters in which the cases are published. This is useful in the event that you want to read an unedited version in the library. An increasing number of cases are also available online. The rules of citation are fairly technical and are of immediate concern only to practicing attorneys. The following discussion presents the standard approach to citation used by lawyers. Those of you interested in additional detail should consult *The Bluebook: A Uniform System of Citation,* 18th edition (Cambridge, MA: Harvard Law Review Association, 2005).

The first number you encounter is the volume in which the case appears. This is followed by the abbreviation of the reporter and by the page number and year of the decision. State cases are available in "regional reporters" that contain appellate decisions of courts in various geographic areas of the United States. These volumes are cited in accordance with standard abbreviations: Atlantic (A.), Northeast (N.E.), Pacific (P.), Southeast (S.E.), South (S.), and Southwest (S.W.). The large number of cases decided has necessitated the organization of these reporters into various "series" (e.g., P.2d and P.3d).

Individual states also have their own reporter systems containing the decisions of intermediate appellate courts and state supreme courts. Decisions of the Nebraska Supreme Court appear in the Northwest Reporter (N.W. or N.W.2d) as well as in the Nebraska Reports (Neb.). The decisions of the Nebraska Court of Appeals are reprinted in Nebraska Court of Appeals (Neb. Ct. App.). These decisions are usually cited to the Northwest Reporter, for example, *Nebraska v. Metzger,* 319 N.W.2d 459 (Neb. 1982). New York and California cases appear in state and regional reporters as well as in their own national reporter.

The federal court reporters reprint the published opinions of federal trials as well as appellate courts. District court (trial) opinions appear in the Federal Supplement Reporter (F.Supp) and appellate court opinions are reprinted in the Federal Reporter (F.), both of which are printed in several series (F.Supp.2d; F.2d and F.3d). These citations also provide the name of the federal court that decided the case. The Second Court of Appeals in New York, for instance, is cited as *United States v. MacDonald,* 531 F.2d 196 (2nd Cir. 1976). The standard citation for U.S. Supreme Court decisions is the United States Report (U.S.), for example, *Papachristou v. Jacksonville,* 405 U.S. 156 (1971). This is the official version issued by the Supreme Court; the decisions are also available in two privately published reporters, the Supreme Court Reporter (S. Ct.) and Lawyers edition (L. Ed.).

There is a growing trend for cases to appear online in commercial electronic databases. States are also beginning to adopt "public domain citation formats" for newly decided cases that appear on state court Web pages. These are cited in accordance with the rules established by the state judiciary. The standard format includes the case name, the year of decision, the state's two-digit postal abbreviation, the abbreviation of the court in the event that this is not a state supreme court decision, the number assigned to the case, and the paragraph number. A parallel citation to the relevant regional reporter is also provided. *The Bluebook* provides examples of this format. The following example is for a state supreme court case: *Gregory v. Class,* 1998 SD 106, ¶ 3, 54 N.W.2d 873, 875.

Legal Terminology

appellant
appellate courts
appellee
bench trial
binding authority
brief
collateral attack
concurring opinion
defendant
dissenting opinion
distinguishing precedents
habeas corpus
head notes
holding
legal reporters
majority opinion
multiple judge panel
obiter dicta
oral argument
per curiam
persuasive authority
petitioner
plurality opinion
precedent
reasoning
relevant
respondent
Socratic method
stare decisis
trial de novo
trial transcript
writ of certiorari

Constitutional Limitations 2

Was the defendant discriminated against based on gender?

Wright, six feet tall and weighing 216 pounds, beat and kicked his wife Wendy on the evening of February 16, 1999. Her injuries were so severe that two of her ribs were fractured and her spleen had to be removed. Wright was indicted for criminal domestic violence of a high and aggravated nature. The aggravating factors alleged in the indictment were "a difference in the sexes of the victim and the defendant" and that "the defendant did inflict serious bodily harm upon the victim by kicking her in the mid-section requiring her to seek medical attention." Wright contends the judge's charge on the aggravating circumstance of a "difference in the sexes" violated his right to "equal protection."

Core Concepts and Summary Statements

Introduction

The United States is a constitutional democracy with limited powers. The authority of the state and federal governments to enact criminal statutes is limited by various constitutional provisions.

The Rule of Legality

The common law rule of legality provides that an individual may be criminally punished only for an act that was condemned in a statute at the time it was committed.

Bills of Attainder and *Ex Post Facto* Laws

Article I, Sections 9 and 10 of the U.S. Constitution prohibit bills of attainder and *ex post facto* laws. A bill of attainder is a legislative act that punishes an identifiable individual or group of individuals without the benefit of trial. An *ex post facto* law is legislation that punishes an act that was not subject to a criminal penalty at the time it was committed.

Statutory Clarity

The Due Process Clause of the U.S. Constitution requires that statutes clearly inform individuals of the acts that are prohibited and establish clear, definite, and certain standards that limit the discretion of law enforcement officials. A statute that fails to provide sufficient clarity is "void for vagueness."

Equal Protection

The Fifth and Fourteenth Amendments to the U.S. Constitution provide for the equal protection of the law. This requires that legislation that singles out a group of individuals for legal regulation must be reasonably related to the advancement of a constitutionally permissible objective. Racial, religious, and ethnic classifications, however, must satisfy a demanding strict scrutiny test. Classifications on gender must meet an "intermediate scrutiny test."

Freedom of Speech

The First Amendment to the U.S. Constitution guarantees the right to freedom of expression. Speech, however, may be limited on the grounds that it constitutes an incitement to riot, threat, fighting words, or obscenity.

Privacy

The U.S. Constitution and various state constitutions provide for a right to privacy that protects intimate personal activities from criminal punishment.

Introduction

In the American democratic system, various constitutional provisions limit the power of the federal and state governments to enact criminal statutes. For instance, a statute prohibiting students from criticizing the government during a classroom discussion would likely violate the First Amendment to the U.S. Constitution. A law punishing individuals engaging in "unprotected" sexual activity, however socially desirable, may unconstitutionally violate the right to privacy.

Why did the framers create a **constitutional democracy,** a system of government based on a constitution that limits the powers of the government? The founding fathers were profoundly influenced by the harshness of British colonial rule and drafted a constitution designed to protect the rights of the individual against the tyrannical tendencies of government. They wanted to ensure that the police could not freely break down doors and search homes. The framers were also sufficiently wise to realize that individuals required constitutional safeguards against the political passions and intolerance of democratic majorities.

The limitations on government power reflect the framers' belief that individuals possess natural and inalienable rights, and that these rights may only be restricted when absolutely necessary to ensure social order and stability. The stress on individual freedom was also practical. The framers believed that the fledgling new American democracy would prosper and develop by freeing individuals to passionately pursue their hopes and dreams.

At the same time, the framers were not wide-eyed idealists. They fully appreciated that individual rights and liberties must be balanced against the need for social order and stability. The striking of this delicate balance is not a scientific process. A review of the historical record indicates that, at times, the emphasis has been placed on the control of crime and, at other times, stress has been placed on individual rights.

Chapter 2 describes the core constitutional limits on the criminal law and examines the balance between order and individual rights. Consider the costs and benefits of constitutionally limiting the government's authority to enact criminal statutes. Do you believe that greater importance should be placed on guaranteeing order or on protecting rights? You should keep the constitutional limitations discussed in this chapter in mind as you read the cases in subsequent chapters. The topics covered in the chapter are as follows:

- The first principle of American jurisprudence is the rule of legality.
- Constitutional constraints include the following:
  - Bills of attainder and *ex post facto* laws
  - Statutory clarity
  - Equal protection
  - Freedom of speech
  - Privacy

We will discuss an additional constitutional constraint, the Eighth Amendment prohibition on cruel and unusual punishment, in Chapter 3.

The Rule of Legality

The **rule of legality** has been characterized as "the first principle of American criminal law and jurisprudence."[1] This principle was developed by common law judges and is interpreted today to mean that an individual may not be criminally punished for an act that was not clearly condemned in a statute prior to the time that the individual committed the act.[2] The doctrine of legality is nicely summarized in the Latin expression ***nullum crimen sine lege, nulla poena sine lege,*** meaning "no crime without law, no punishment without law." The doctrine of legality is reflected in two constitutional principles governing criminal statutes:

- the constitutional prohibition on bills of attainder and *ex post facto* laws, and
- the constitutional requirement of statutory clarity.

Bills of Attainder and *Ex Post Facto* Laws

Article I, Sections 9 and 10 of the U.S. Constitution prohibit state and federal legislatures from passing **bills of attainder** and ***ex post facto* laws**. James Madison characterized these provisions as a "bulwark in favor of personal security and personal rights."[3]

Bills of Attainder

A bill of attainder is a legislative act that punishes an individual or a group of persons without the benefit of a trial. The constitutional prohibition of bills of attainder was intended to safeguard Americans from the type of arbitrary punishments that the English Parliament directed against opponents of the Crown. The Parliament disregarded the legal process and directly ordered that dissidents should be imprisoned, executed, or banished and forfeit their property.[4] The prohibition of a bill of attainder was successfully invoked in 1946 by members of the American Communist Party, who were excluded by Congress from working for the federal government.[5]

Ex Post Facto Laws

Alexander Hamilton explained that the constitutional prohibition on *ex post facto* laws was vital because "subjecting of men to punishment for things which, when they were done were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instrument of tyranny."[6] In 1798, Supreme Court Justice Samuel Chase in *Calder v. Bull* listed four categories of *ex post facto* laws:[7]

- Every law that makes an action, done before the passing of the law, and was *innocent* when done, criminal; and punishes such action.
- Every law that *aggravates* a crime, or makes it *greater* than it was, when committed.
- Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed.
- Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*

The constitutional rule against *ex post facto* laws is based on the familiar interests in providing individuals notice of criminal conduct and protecting individuals against retroactive "after the fact" statutes. Supreme Court Justice John Paul Stevens noted that all four of Justice Chase's categories are "mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction."[8]

In summary, the prohibition on *ex post facto* laws prevents legislation being applied to *acts committed before the statute went into effect.* The legislature is free to declare that in the *future* a previously innocent act will be a crime. Keep in mind that the prohibition on *ex post facto* laws is directed against enactments that disadvantage defendants; legislatures are free to retroactively assist defendants by reducing the punishment for a criminal act.

The distinction between bills of attainder and *ex post facto* laws is summarized as follows:

- A bill of attainder punishes a specific individual or specific individuals. An *ex post facto* law criminalizes an act that was legal at the time the act was committed.
- A bill of attainder is not limited to criminal punishment and may involve any disadvantage imposed on an individual; *ex post facto* laws are limited to criminal punishment.
- A bill of attainder imposes punishment on an individual without trial. An *ex post facto* law is enforced in a criminal trial.

The Supreme Court and *Ex Post Facto* Laws

Determining whether a retroactive application of the law violates the prohibition on *ex post facto* laws has proven more difficult than might be imagined given the seemingly straightforward nature of this constitutional ban.

In *Stogner v. California,* the Supreme Court ruled that a California law authorizing the prosecution of allegations of child abuse that previously were barred by a three-year statute of limitations constituted a prohibited *ex post facto* law.[9] This law was challenged by Marion Stogner, who found himself indicted for child abuse after having lived the past nineteen years without fear of criminal prosecution for an act committed twenty-two years prior. Justice Stephen Breyer ruled that California acted in an "unfair" and "dishonest" fashion in subjecting Stogner to prosecution many years after the State had assured him that he would not stand trial. Judge Anthony Kennedy argued in dissent that California merely reinstated a prosecution that was previously barred by the three-year statute of limitations. The penalty attached to the crime of child abuse remained unchanged. What is your view?

We now turn our attention to the requirement of statutory clarity.

Statutory Clarity

The Fifth and Fourteenth Amendments of the U.S. Constitution prohibit depriving individuals of "life, liberty or property without due process of law." Due process requires that criminal statutes should be drafted in a clear and understandable fashion. A statute that fails to meet this standard is unconstitutional on the grounds that it is **void for vagueness.**

Due process requires that individuals receive notice of criminal conduct. Statutes are required to define criminal offenses with sufficient *clarity* so that ordinary individuals are able to understand what conduct is prohibited.

Due process requires that the police, prosecutors, judges, and jurors are provided with a reasonably clear statement of prohibited behavior. The requirement of definite standards ensures the uniform and nondiscriminatory enforcement of the law.

In summary, *due process ensures clarity in criminal statutes. It guards against individuals being deprived of life (the death penalty), liberty (imprisonment), or property (fines) without due process of law.*

Clarity

Would a statute that punishes individuals for being a member of a gang satisfy the test of statutory clarity? The U.S. Supreme Court, in *Grayned v. Rockford,* ruled that a law was void for vagueness that punished an individual "known to be a member of any gang consisting of two or more persons." The Court observed that "no one may be required at peril of life, liberty or property to speculate as to the meaning of [the term gang in] penal statutes."[10]

In another example, the Supreme Court ruled in *Coates v. Cincinnati* that an ordinance was unconstitutionally void for vagueness that declared that it was a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." The Court held that the statute failed to provide individuals with reasonably clear guidance because "conduct that annoys some people does not annoy others," and that an individual's arrest may depend on whether he or she happens to "annoy" a "police officer or other person who should happen to pass by." This did not mean that Cincinnati was helpless to maintain the city sidewalks; the city was free to prohibit people from "blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct."[11]

Definite Standards for Law Enforcement

Edward Lawson was detained or arrested on roughly fifteen occasions between March and July 1977. Lawson certainly stood out; he was distinguished by his long dreadlocks and habit of wandering the streets of San Diego at all hours. Lawson did not carry any identification, and each of his arrests was undertaken pursuant to a statute that required that an individual detained for investigation by a police officer present "credible and reliable" identification that carries a "reasonable assurance" of its authenticity and that provides "means for later getting in touch with the person who has identified himself."[12]

The U.S. Supreme Court explained in *Kolender v. Lawson* that the void-for-vagueness doctrine was aimed at ensuring that statutes clearly inform citizens of prohibited acts and simultaneously providing definite standards for the enforcement of the law. The California statute was clearly void for vagueness, because no standards were provided for determining what constituted "credible and reliable" identification, and "complete discretion" was vested in the police to determine whether a suspect violated the statute. Was a library or credit card or student identification "credible and reliable" identification? A police officer explained at trial that a jogger who was not carrying identification might satisfy the statute by providing his or her running route or name and address. Did this constitute "credible and reliable" identification? The Court was clearly concerned that a lack of definite standards opened the door to the police using the California statute to arrest individuals based on their race, gender, or appearance.

Due process does not require "impossible standards" of clarity, and the Supreme Court stressed that this was not a case in which "further precision" was "either impossible or impractical." There seemed to be little reason why the legislature could not specify the documents that would satisfy the statutory standard and avoid vesting complete discretion in the "moment-to-moment judgment" of a police officer on the street. Laws were to be made by the legislature and enforced by the police: "To let a policeman's command become equivalent to a criminal statute comes dangerously near to making our government one of men rather than laws."[13]

The Supreme Court has stressed that the lack of standards presents the danger that a law will be applied in a discriminatory fashion against minorities and the poor. In *Papachristou v. Jacksonville,* the U.S. Supreme Court expressed the concern that a broadly worded vagrancy statute punishing "rogues and vagabonds"; "lewd, wanton and lascivious persons"; "common railers and brawlers"; and "habitual loafers" failed to provide standards for law enforcement and risked that the poor, minorities, and nonconformists would be targeted for arrest based on the belief that they posed a threat to public safety.[14] The court humorously noted that middle-class individuals who frequented the local country club were unlikely to be arrested, although they might be guilty under the ordinance of "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served."[15]

Broadly worded statutes are a particular threat in a democracy in which we are committed to protecting even the most extreme nonconformist from governmental harassment. The U.S. Supreme Court, in *Cincinnati v. Coates,* expressed concern that the lack of clear standards in the local ordinance might lead to the arrest of individuals who were exercising their constitutionally protected rights. Under the Cincinnati statute, association and assembly on the public streets would be "continually subject" to whether the demonstrators' "ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[16]

Void for Vagueness

Judges are aware that language cannot achieve the precision of a mathematical formula. Legislatures are also unable to anticipate every possible act that may threaten society, and understandably they resort to broad language. Consider the obvious lack of clarity of a statute punishing a "crime against nature." In *Horn v. State,* the defendant claimed that a law punishing a "crime against nature" was vague and indefinite and failed to inform him that he was violating the law in raping a ten-year-old boy. An Alabama court ruled that the definition of a "crime against nature" was widely discussed in legal history and was "too disgusting and well known" to require further details or description.[17] Do you agree?

Judges appreciate the difficulty of clearly drafting statutes and typically limit the application of the void-for-vagueness doctrine to cases in which the constitutionally protected rights and liberties of people to meet, greet, congregate in groups, move about, and express themselves are threatened.

A devil's advocate may persuasively contend that the void-for-vagueness doctrine provides undeserved protection to "wrongdoers." In *Nebraska v. Metzger,* a neighbor spotted Metzger standing naked with his arms at his sides in the large window of his garden apartment for roughly five seconds.[18] The neighbor testified that he saw Metzger's body from "his thighs on up." The police were called and observed Metzger standing within a foot of the window eating a bowl of cereal and noted that "his nude body, from the mid-thigh on up, was visible." The ordinance under which Metzger was charged and convicted made it unlawful to commit an "indecent, immodest or filthy act within the presence of any person, or in such a situation that persons passing might ordinarily see the same." The Nebraska Supreme Court ruled that this language provided little advance notice

as to what is lawful and what is unlawful and could be employed by the police to arrest individuals for entirely lawful acts that some might consider immodest, including holding hands, kissing in public, or wearing a revealing swim suit. Could Metzger possibly believe that there was no legal prohibition on his standing nude in his window? Keep these points in mind as you read the first case in the textbook, *State v. Stanko*.

Did the defendant know that he was driving at an excessive rate of speed?

State v. Stanko, *974 P.2D 1132 (MONT. 1998),* Opinion by: Trieweiler, J.

Facts

Kenneth Breidenbach is a member of the Montana Highway Patrol who, at the time of trial and the time of the incident that formed the basis for Stanko's arrest, was stationed in Jordan, Montana. On March 10, 1996, he was on duty patrolling Montana State Highway 24 and proceeding south from Fort Peck toward Flowing Wells in "extremely light" traffic at about 8 A.M. on a Sunday morning when he observed another vehicle approaching him from behind.

He stopped or slowed, made a right-hand turn, and proceeded west on Highway 200. About one-half mile from that intersection, in the first passing zone, the vehicle that had been approaching him from behind passed him. He caught up to the vehicle and trailed the vehicle at a constant speed for a distance of approximately eight miles while observing what he referred to as the two- or three-second rule. . . . He testified that he clocked the vehicle ahead of him at a steady 85 miles per hour during the time that he followed it. At that speed, the distance between the two vehicles was from 249 to 374 feet. . . . Officer Breidenbach signaled him to pull over and issued him a ticket for violating Section 61–8-303(1), Montana Code Annotated (MCA). The basis for the ticket was the fact that Stanko had been operating his vehicle at a speed of 85 miles per hour at a location where Officer Breidenbach concluded it was unsafe to do so.

The officer testified that the road at that location was narrow, had no shoulders, and was broken up by an occasional frost heave. He also testified that the portion of the road over which he clocked Stanko included curves and hills that obscured vision of the roadway ahead. However, he acknowledged that at a distance of from 249 to 374 feet behind Stanko, he had never lost sight of Stanko's vehicle. The roadway itself was bare and dry, there were no adverse weather conditions, and the incident occurred during daylight hours. Officer Breidenbach apparently did not inspect the brakes on Stanko's vehicle or make any observation regarding its weight. The only inspection he conducted was of the tires, which appeared to be brand new. He also observed that it was a 1996 Camaro, which was a sports car, and that it had a suspension system designed so that the vehicle could be operated at high speeds. He also testified that while he and Stanko were on Highway 24 there were no other vehicles that he observed, that during the time that he clocked Stanko . . . they approached no other vehicles going in their direction, and that he observed a couple of vehicles approach them in the opposite direction during that eight-mile stretch of highway.

Although Officer Breidenbach expressed the opinion that 85 miles per hour was unreasonable at that location, he gave no opinion about what would have been a reasonable speed, nor did he identify anything about Stanko's operation of his vehicle, other than the speed at which he was traveling, which he considered to be unsafe. Stanko testified that on the date he was arrested he was driving a 1996 Chevrolet Camaro that he had just purchased one to two months earlier and that had been driven fewer than 10,000 miles. He stated that the brakes, tires, and steering were all in perfect operating condition, the highway conditions were perfect, and he felt that he was operating his vehicle in a safe manner. He conceded that after passing Officer Breidenbach's vehicle, he drove at a speed of 85 miles per hour but testified that because he was aware of the officer's presence he was extra careful about the manner in which he operated his vehicle. He felt that he would have had no problem avoiding any collision at the speed that he was traveling. Stanko testified that he was fifty years old at the time of trial, drives an average of 50,000 miles a year, and has never had an accident.

Issue

Is Section 61–8-303(1), MCA, so vague that it violates the Due Process Clause found at article 2 section 17 of the Montana Constitution? . . . Stanko contends that Section 61–8-303(1), MCA, is unconstitutionally vague because it fails to give a motorist of ordinary intelligence fair notice of the speed at which he or she violates the law, and because it delegates an important public policy matter, such as the appropriate speed on Montana's highways, to policemen, judges, and juries for resolution on a case-by-case basis. Section 61–8-303(1), MCA, provides as follows:

> A person operating or driving a vehicle of any character on a public highway of this state shall

> drive the vehicle in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead. The person operating or driving the vehicle shall drive the vehicle so as not to unduly or unreasonably endanger the life, limb, property, or other rights of a person entitled to the use of the street or highway.

The question is whether a statute that regulates speed in the terms set forth above gave Stanko reasonable notice of the speed at which his conduct would violate the law.

Reasoning

In Montana, we have established the following test for whether a statute is void on its face for vagueness: "A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." . . . No person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties. We conclude that, as a speed limit, Section 61–8-303(1), MCA, does not meet these requirements of the Due Process Clause of article 2 section 17 of the Montana Constitution, nor does it further the values that the void-for-vagueness doctrine is intended to protect.

For example, while it was the opinion of Officer Breidenbach that 85 miles per hour was an unreasonable speed at the time and place where Stanko was arrested, he offered no opinion regarding what a reasonable speed at that time and place would have been. Neither was the attorney general, the chief law enforcement officer for the state, able to specify a speed that would have been reasonable for Stanko at the time and place where he was arrested. . . .

The difficulty that Section 61–8-303(1), MCA, presents as a statute to regulate speed on Montana's highways, especially as it concerns those interests that the void-for-vagueness doctrine is intended to protect, was further evident from the following discussion with the attorney general during the argument of this case:

> *Q.* Well how many highway patrol men and women are there in the State of Montana?
>
> *A.* There are 212 authorized members of the patrol. Of that number, about 190 are officers and on the road.
>
> *Q.* And I understand there are no specific guidelines provided to them to enable them to know at what point, exact point, a person's speed is a violation of the basic rule?
>
> *A.* That's correct, your honor, because that's not what the statute requires. We do not have a numerical limit. We have a basic rule statute that requires the officer to take into account whether or not the driver is driving in a careful and prudent manner, using the speed.
>
> *Q.* And it's up to each of their individual judgments to enforce the law?
>
> *A.* It is, your honor, using their judgment applying the standard set forth in the statute. . . .

It is evident from the testimony in this case and the arguments to the court that the average motorist in Montana would have no idea of the speed at which he or she could operate his or her motor vehicle on this state's highways without violating Montana's "basic rule" based simply on the speed at which he or she is traveling. Furthermore, the basic rule not only permits, but requires the kind of arbitrary and discriminatory enforcement that the Due Process Clause in general, and the void-for-vagueness doctrine in particular, are designed to prevent. It impermissibly delegates the basic public policy of how fast is too fast on Montana's highways to "policemen, judges, and juries for resolution on an ad hoc and subjective basis."

. . . For example, the statute requires that a motor vehicle operator and Montana's law enforcement personnel take into consideration the amount of traffic at the location in question, the condition of the vehicle's brakes, the vehicle's weight, the grade and width of the highway, the condition of its surface, and its freedom from obstruction to the view ahead. However, there is no specification of how these various factors are to be weighted, or whether priority should be given to some factors as opposed to others. This case is a good example of the problems inherent in trying to consistently apply all of these variables in a way that gives motorists notice of the speed at which the operation of their vehicles becomes a violation of the law. . . .

Holding

We do not, however, mean to imply that motorists who lose control of their vehicles or endanger the life, limb, or property of others by the operation of their vehicles on a street or highway cannot be punished for that conduct pursuant to other statutes. . . . We simply hold that Montanans cannot be charged, prosecuted, and punished for speed alone without notifying them of the speed at which their conduct violates the law. . . . The judgment of the district court is reversed. . . .

Dissenting, *Turnage, J.*

This important traffic regulation has remained unchanged as the law of Montana . . . since 1955. . . . Apparently for the past forty-three years, other citizens driving upon our highways had no problem in understanding this statutory provision. Section 61–8-303(1), MCA, is not vague and most particularly is not unconstitutional as a denial of due process. . . .

Dissenting, *Regnier, J.*

The arresting officer described in detail the roadway where Stanko was operating his vehicle at 85 miles per hour. The roadway was very narrow with no shoulders. There were frost heaves on the road that caused the officer's vehicle to bounce. The highway had steep hills, sharp curves, and multiple no-passing zones. There were numerous ranch and field access roads in the area, which ranchers use for bringing hay to their cattle. The officer testified that at 85 miles per hour, there was no way for Stanko to stop in the event there had been an obstruction on the road beyond the crest of a hill. In the officer's judgment, driving a vehicle at the speed of 85 miles per hour on the stretch of road in question posed a danger to the rest of the driving public. In my view, Stanko's speed on the roadway where he was arrested clearly falls within the behavior proscribed by the statute. . . .

Questions for Discussion

1. What were the facts the police officer relied on in arresting Stanko for speeding? Contrast these with the facts recited by Stanko in insisting that he was driving at a reasonable speed.
2. The statute employs a "reasonable person" standard and lists a number of factors to be taken into consideration in determining whether a motorist is driving at a proper rate of speed. Was the decision of the Montana Supreme Court based on the lack of notice provided to motorists concerning a reasonable speed or based on the failure to provide law enforcement officers with clear standards for enforcement?
3. Why does Chief Justice Turnage refer to Section 61–8-303(1), MCA as an "important traffic regulation" and stress that this has been the law for forty-three years? Can you speculate as to why Montana failed to post speed limits on highways?
4. Do you agree with the majority opinion or with the dissenting judges?
5. The Montana state legislature reacted by establishing speed limits of "75 mph at all times on Federal . . . interstate highways outside an urban area" . . . and "70 mph during the daytime and 65 mph during the nighttime on any other public highway." Why did the legislature believe that this statute solved the void-for-vagueness issue?

Cases and Comments

Stanko's Subsequent Arrests. Stanko was arrested for reckless driving on August 13, 1996, and again on October 1, 1996. He was charged on both occasions with operating a vehicle with "willful or wanton disregard for the safety of persons or property." Two officers cited the fact that Stanko was driving between 117 and 120 miles per hour on narrow, hilly highways with the risk of encountering farm, ranch, tourist, and recreational vehicles and wildlife and placing emergency personnel at risk. Stanko possessed extraordinary confidence in his driving ability and dismissed the suggestion that he was driving in a wanton and reckless fashion.

He pointed out that he drove roughly 6,000 miles a month without an accident and that he had won several stock-car races in Oregon almost twenty years previously. The Montana Supreme Court unanimously ruled that Stanko should have reasonably understood that the manner in which he was driving posed a risk to other motorists who "do not assume the risk of driving in racetrack conditions." The Montana Supreme Court stressed that Stanko's conviction was not "based on speed alone" and dismissed his claim that the reckless driving law was unconstitutionally vague. See *State v. Stanko,* 974 P.2d 1139 (Mont. 1998).

See more cases on the study site: State v. Metzger, *www.sagepub.com/lippmanccl2e*

You Decide

2.1 David C. Bryan was involved in a relationship with a young woman during the fall semester of 1994 at the University of Kansas. The relationship ended and Bryan allegedly repeatedly contacted the young woman, including personally approaching her in a university building. Bryan subsequently was charged under the Kansas stalking statute. The Kansas statute at the time prohibited an "intentional and malicious following or course of conduct when such following or course of conduct seriously alarms, annoys or harasses the person." The statute failed to specify whether a "following" that "alarms, annoys or harasses" was to be measured by the standard of a "reasonable person." Bryan contends that the statute is unconstitutionally vague. How should the judge rule? Could you suggest how the state legislature could clarify the law? Consider the perspectives of a female victim and male defendant. See *State v. Bryan,* 910 P.2d 212 (Kan. 1996). Another Kansas case on stalking is *State v. Rucker,* 987 P.2d 1080 (Kan. 1999).

You can find the answer at www.sagepub.com/lippmanccl2e

Equal Protection

The U.S. Constitution originally did not provide for the **equal protection** of the laws. Professor Erwin Chemerinsky observes that this is not surprising, given that African Americans were enslaved, and women were subject to discrimination. Slavery, in fact, was formally embedded in the legal system. Article I, Section 2 of the U.S. Constitution provides for the apportionment of the House of Representatives based on the "whole number of free persons" as well as three-fifths of the slaves. This was reinforced by Article IV, Section 2, the Fugitive Slave Clause, which requires the return of a slave escaping into a state that does not recognize slavery.[19]

For an international perspective on this topic, visit the study site.

Immediately following the Civil War, in 1865 Congress enacted and the states ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Discrimination against African Americans nevertheless continued, and Congress responded by approving the Fourteenth Amendment in 1858. Section 1 provides that "no state shall deprive any person of life, liberty or property without due process of law, or deny any person equal protection of the law." The Supreme Court declared in 1954 that the Fifth Amendment Due Process Clause imposes an identical obligation to ensure the equal protection of the law on the federal government.[20]

The Equal Protection Clause was rarely invoked for almost one hundred years. Justice Oliver Wendell Holmes, Jr., writing in 1927, typified the lack of regard for the Equal Protection Clause when he referred to the amendment as "the last resort of constitutional argument."[21] The famous 1954 Supreme Court decision in *Brown v. Board of Education* ordering the desegregation of public schools with "all deliberate speed" ushered in a period of intense litigation over the requirements of the clause.[22]

Three Levels of Analysis

Criminal statutes typically make distinctions based on various factors, including the age of victims and the seriousness of the offense. For instance, a crime committed with a dangerous weapon may be punished more harshly than a crime committed without a weapon. Courts generally accept the judgment of state legislatures in making differentiations so long as a law is rationally related to a legitimate government purpose. Legitimate government purposes generally include public safety, health, morality, peace and quiet, and law and order. There is a strong presumption that a law is constitutional under this **rational basis test** or **minimum level of scrutiny test.**[23]

In *Westbrook v. Alaska,* nineteen-year-old Nicole M. Westbrook contested her conviction for consuming alcoholic beverages when under the age of twenty-one. Westbrook argued that there was no basis for distinguishing between a twenty-one-year-old and an individual who was slightly younger. The Alaska Supreme Court recognized that there may be some individuals younger than twenty-one who possess the judgment and maturity to handle alcoholic beverages and that some individuals over twenty-one may fail to meet this standard. The court observed that states have established the drinking age at various points and that setting the age between nineteen and twenty-one years of age seemed to be rationally related to the objective of ensuring responsible drinking. As a result, the court concluded that "even if we assume that Westbrook is an exceptionally mature 19-year-old, it is still constitutional for the legislature to require her to wait until she turns 21 before she drinks alcoholic beverages."[24]

In contrast, the courts apply a strict scrutiny test in examining distinctions based on race and national origin. Racial discrimination is the very evil that the Fourteenth Amendment was intended to prevent, and the history of racism in the United States raises the strong probability that such classifications reflect a discriminatory purpose. In *Strauder v. West Virginia,* the U.S. Supreme Court struck down a West Virginia statute as unconstitutional that limited juries to "white male persons who are twenty-one years of age."[25]

Courts are particularly sensitive to racial classifications in criminal statutes and have ruled that such laws are unconstitutional in almost every instance. The Supreme Court observed that "in this context . . . the power of the State weighs most heavily upon the individual or the group."[26] In *Loving v. Virginia,* in 1967, Mildred Jeter, an African American, and Richard Loving, a Caucasian, pled guilty to violating Virginia's ban on interracial marriages and were sentenced to twenty-five years in prison, a sentence that was suspended on the condition that the Lovings leave Virginia. The Supreme Court stressed that laws containing racial classifications must be subjected to the "most rigid scrutiny" and determined that the statute violated the Equal Protection Clause. The Court failed to find any "legitimate overriding purpose independent of invidious racial discrimination" behind the law. The fact that Virginia "prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their justification, as measures

designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[27] The strict scrutiny test also is used when a law limits the exercise of "fundamental rights" (such as freedom of speech).

The Supreme Court has adopted a third, intermediate level of scrutiny for classifications based on gender. The decision to apply this standard rather than strict scrutiny is based on the consideration that although women historically have confronted discrimination, the biological differences between men and women make it more likely that gender classifications are justified. Women, according to the Court, also possess a degree of political power and resources that are generally not found in "isolated and insular minority groups." Intermediate scrutiny demands that the State provide some meaningful justification for the different treatment of men and women and not rely on stereotypes or classifications that have no basis in fact. Justice Ruth Ginsburg applied intermediate scrutiny in ordering that the Virginia Military Institute admit women and ruled that gender-based government action must be based on "an exceedingly persuasive justification . . . the burden of justification is demanding and it rests entirely on the State."[28]

In *Michael M. v. Superior Court,* the U.S. Supreme Court upheld the constitutionality of California's "statutory rape law" that punished "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."[29] Is it constitutional to limit criminal liability to males?

The Supreme Court noted that California possessed a "strong interest" in preventing illegitimate teenage pregnancies. The Court explained that imposing criminal sanctions solely on males roughly "equalized the deterrents on the sexes," because young men did not face the prospects of pregnancy and child rearing. The Court also deferred to the judgment of the California legislature that extending liability to females would likely make young women reluctant to report violations of the law.[30]

In summary, there are three different tests under the Equal Protection Clause:

- ***Rational Basis Test.*** A classification is *presumed valid* so long as it is rationally related to a constitutionally permissible state interest. An individual challenging the statute must demonstrate that there is no rational basis for the classification. This test is used in regards to the "nonsuspect" categories of the poor, the elderly, and the mentally challenged and to distinctions based on age.
- ***Strict Scrutiny.*** A law singling out a racial or ethnic minority must be strictly necessary, and there must be no alternative approach to advancing a compelling state interest. This test is also used when a law limits fundamental rights.
- ***Intermediate Scrutiny.*** Distinctions on the grounds of gender must be substantially related to an important government objective. A law singling out women must be based on factual differences and must not rest on overbroad generalizations.

The next case in the textbook, *Wright v. South Carolina,* asks you to consider whether the defendant was sentenced under a statutory provision that reflects an outdated view of women. Is this a case of gender discrimination against the male defendant under the intermediate scrutiny test? You will want to refer back to this case when we discuss equal protection and sentencing in Chapter 3.

Was the defendant's prison sentence based on a statutory provision that discriminated against men?

Wright v. South Carolina, *563 S.E.2D 311 (S.C. 2000),* Opinion by: Waller, J.

Todd William Wright was convicted of criminal domestic violence of a high and aggravated nature (CDVHAN) and sentenced to ten years imprisonment, suspended upon service of eight years, and five years probation. We affirm.

Facts

Wright, six feet tall and weighing 216 pounds, beat and kicked his wife Wendy on the evening of February 16, 1999. Her injuries were so severe that two of her ribs were

fractured and her spleen had to be removed. Wright was indicted for criminal domestic violence of a high and aggravated nature. The aggravating factors alleged in the indictment were "a difference in the sexes of the victim and the defendant" and/or that "the defendant did inflict serious bodily harm upon the victim by kicking her in the mid-section requiring her to seek medical attention."

The offense of CDVHAN incorporates the aggravating factor of an assault and battery of a high and aggravated nature (ABHAN). The elements of ABHAN that result in a defendant receiving a harsher sentence are (1) the unlawful act of violent injury to another, accompanied by circumstances of aggravation. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. . . .

Wright objected to the judge's charge on the aggravating circumstance of "a difference of the sexes," contending it violated equal protection. The objection was overruled; Wright was found guilty as charged.

Issue

Does the aggravating circumstance of a "difference in the sexes" violate equal protection in violation of the Fourteenth Amendment Section 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws")?

Reasoning

Wright contends the judge's charge on the aggravating circumstance of a "difference in the sexes" violated his right to equal protection. We disagree. The Equal Protection Clause prevents only irrational and unjustified classifications, not all classifications. For a gender-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective. A law will be upheld where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances. See *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 469 (1981) (holding that as long as the rule of nature that the sexes are not similarly situated in certain circumstances is realistically reflected in a gender classification, the statute will be upheld as constitutional). In *Michael M.,* Justice Stewart wrote that "when men and women are not in fact similarly situated . . . the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. While those differences must never be permitted to become a pretext for invidious discrimination . . . the Constitution . . . does not require a State to pretend that demonstrable differences between men and women do not really exist."

In *State v. Gurganus,* 250 S.E.2d 668 (N.C. 1979), the North Carolina Supreme Court upheld a statute enhancing the punishment for males convicted of assault on a female stating, "We base our decision . . . upon the demonstrable and observable fact that the average adult male is taller, heavier and possesses greater body strength than the average female." We . . . think that the South Carolina General Assembly was also entitled to take note of the differing physical sizes and strengths of the sexes. Having noted such facts, the General Assembly could reasonably conclude that assaults and batteries without deadly weapons by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females. Having so concluded, the General Assembly could choose to provide greater punishment for these offenses, which it found created greater danger to life and limb, without violating the Fourteenth Amendment. . . .

Certainly some individual females are larger, stronger, and more violent than many males. The General Assembly is not, however, required by the Fourteenth Amendment to modify criminal statutes that have met the test of time in order to make specific provisions for any such individuals. The Constitution of the United States has not altered certain virtually immutable facts of nature, and the General Assembly of South Carolina is not required to undertake to alter those facts. The South Carolina statute establishes classifications by gender that serve important governmental objectives and are substantially related to achievement of those objectives. Therefore, we hold that the statute does not deny males equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States. . . .

Holding

We find that the "difference in gender" aggravator is legitimately based upon realistic physiological size and strength differences of men and women such that it does not violate equal protection. . . . We therefore affirm Wright's convictions.

Concurring, *Toal, J.*

While I concur with the majority's decision to affirm Wright's CDVHAN conviction, I disagree with the majority's conclusion that the "difference in the sexes" aggravating circumstance does not violate equal protection. I believe the "difference in the sexes" aggravating circumstance, as a gender-based classification, violates equal protection. . . .

The CDVHAN statute was designed to address violence in the home; it applies when any person harms any member of his or her household. The statute then is designed to prevent domestic violence against men, women, and children by perpetrators of both sexes (household members include spouses, former spouses, parents and children, relatives to the second degree, persons with a child

in common, and males and females who are cohabiting or have previously cohabited). Having an aggravating circumstance based solely on gender does not substantially further this objective or the narrower objective of protecting women from domestic abuse. In my opinion, this gender-based classification is no different than the classification . . . in *In the Interest of Joseph T.* In that case, this court held that a statute criminalizing communication of indecent messages to females violated the Equal Protection Clause. Although the court recognized that some gender-based classifications that realistically reflect that men and women are not similarly situated can withstand equal protection scrutiny on occasion, it clarified that distinctions in the law that were based on "old notions" that women should be afforded "special protection" could no longer withstand equal protection scrutiny.

In my opinion, this "difference in gender" aggravating circumstance is a distinction that perpetuates these "old notions." There is no logical purpose for it except to protect physically inferior women from stronger men. . . . Deterring domestic violence is more efficiently and appropriately accomplished through other aggravators, such as the "great disparity in ages or physical conditions of the parties" and "infliction of serious bodily injury" aggravators. In many cases, there may be a great disparity in strength between a male and a female, but if there is not, there is no reason why a difference in gender should serve as an aggravating circumstance to "protect" women to the detriment of men. Therefore, I would find that the "difference in the sexes" aggravating circumstance violates equal protection, because it fails to substantially relate to the government objective of preventing domestic violence. However, I would affirm Wright's conviction, because the jury also found a permissible, gender-neutral aggravating circumstance: infliction of serious bodily injury. Accordingly, I respectfully concur in result only.

Questions for Discussion

1. Explain why Wright claims that his enhanced sentence is based on gender discrimination. Would this aggravator apply to a homosexual couple or in a case in which a daughter abused her mother?
2. Why does Judge Waller reject the defendant's equal protection claim?
3. Do you agree with Judge Toal that the "difference in gender" aggravating factor reflects outdated stereotypes concerning women? What is his solution?
4. How would you rule as a judge in this case?

Cases and Comments

Detention of Japanese Americans During World War II. In *Korematsu v. United States,* the U.S. Supreme Court upheld the conviction of Fred Korematsu, an American citizen of Japanese descent, for remaining in San Leandro, California, in defiance of Civilian Exclusion Order No. 34 issued by the commanding general of the Western Command, U.S. Army. This prosecution was undertaken pursuant to an act of Congress of March 21, 1942, that declared it was a criminal offense punishable by a fine not to exceed $5,000 or by imprisonment for not more than a year for a person of Japanese ancestry to remain in "any military area or military zone" established by the president, secretary of defense, or a military commander. Japanese Americans who were ordered to leave their homes were detained in remote relocation camps. Exclusion Order No. 34 was one of a number of orders and proclamations issued under the authority of President Franklin Delano Roosevelt; it stated that "successful prosecution of the war [World War II] requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national-defense utilities." Justice Hugo Black recognized that legal restrictions that "curtail the civil rights of a single racial group are immediately suspect" and that individuals excluded from the military zone would be subject to relocation and detention without trial in a camp far removed from the West Coast. The Supreme Court nevertheless affirmed the constitutionality of the order by a vote of six to three. The majority concluded the following:

> Korematsu was not excluded from the Military Area because of hostility to him or to his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders . . . determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—say that at that time these actions were unjustified.

Justice Frank Murphy questioned the constitutionality of this order, which he contended unconstitutionally excluded both citizens and noncitizens of Japanese

ancestry from the Pacific Coast. He concluded that the "exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." Was this a case of racial discrimination or an effort to safeguard the United States from an attack by Japan? What is the standard of review? Would such a law be ruled constitutional today? See *Korematsu v. United States,* 323 U.S. 214 (1944).

See more cases on the study site: Frazier v. State, *www.sagepub.com/lippmanccl2e*

You Decide

2.2 Joseph Kelly David pled guilty to first-degree homicide by vehicle based on an indictment alleging that he drove an automobile under the influence of alcohol, thereby causing the death of a passenger in the vehicle when he lost control and the car overturned. He was sentenced to six years in prison. The trial court denied David's motion to withdraw his guilty plea, and he appealed to the Court of Appeals of Georgia. David alleged that his attorney had improperly directed him to plead guilty, when, in fact, he could not be held responsible for vehicular homicide under the existing statutory scheme.

David was seventeen at the time of the accident and pled guilty to Official Code of Georgia (OCGA) Section 40–6-393(a), which provides that "any person who . . . causes the death of another person through the violation of . . . Code Section . . . 40–6-391 commits the offense of homicide by vehicle in the first degree." David's blood alcohol level was measured at 0.08 grams after the accident. Section 40–6-391(k)(1) provides that an individual under the age of twenty-one "shall not drive or be in actual physical control of any moving vehicle while the person's alcohol concentration is 0.02 grams or more. . . ."

David argued that he was denied equal protection of the law, because a driver twenty-one years of age or older was not subject to first-degree vehicular homicide under OCGA Section 40–6-393(a) until his or her alcohol concentration was 0.10 grams or higher. Did Georgia violate equal protection by providing a different standard for first-degree vehicular homicide for Joseph Kelly David than for an individual twenty-one years of age or older? See *David v. Georgia,* 583 S.E.2d 135 (Ga. App. 2003).

You can find the answer at www.sagepub.com/lippmanccl2e

We next look at constitutional protections for freedom of speech and privacy.

Freedom of Speech

The **First Amendment** to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of the speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The U.S. Supreme Court extended this prohibition to the states in a 1925 Supreme Court decision in which the Court proclaimed that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected under the Due Process Clause of the Fourteenth Amendment from impairment by the States."[31]

The Fourteenth Amendment to the Constitution applies to the states and was adopted following the Civil War in order to protect African Americans against the deprivation of "life, liberty and property without due process" as well as to guarantee former slaves "equal protection of the law." The Supreme Court has held that the Due Process Clause incorporates various fundamental freedoms that generally correspond to the provisions of the **Bill of Rights** (the first ten amendments to the U.S. Constitution that create rights against the federal government). This **incorporation theory** has resulted in a fairly uniform national system of individual rights that includes freedom of expression.

The famous, and now deceased, First Amendment scholar Thomas I. Emerson identified four functions central to democracy performed by freedom of expression under the First Amendment:[32]

- Freedom of expression contributes to *individual self-fulfillment* by encouraging individuals to express their ideas and creativity.
- Freedom of expression insures *a vigorous "marketplace of ideas"* in which a diversity of views are expressed and considered in reaching a decision.
- Freedom of expression *promotes social stability* by providing individuals the opportunity to be heard and to influence the political and policy-making process. This promotes the acceptance of decisions and discourages the resort to violence.
- Freedom of expression ensures that there is a steady stream of innovative ideas and enables the *government to identify and address newly arising issues.*

The First Amendment is vital to the United States' free, open, and democratic society. Justice William Douglas wrote in *Terminello v. Chicago*[33] that speech

> may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Justice Robert H. Jackson, reflecting on his experience as a prosecutor during the Nuremberg trials of Nazi war criminals, cautioned Justice Douglas that the

> choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Justice Jackson is clearly correct that there must be some limit to freedom of speech. But where should the line be drawn? The Supreme Court articulated these limits in *Chaplinsky v. New Hampshire* and observed that there are "certain well-recognized categories of speech which may be permissibly limited under the First Amendment." The Supreme Court explained that these "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[34] The main categories of speech for which *content is not protected by the First Amendment* and that may result in the imposition of criminal punishment are as follows:

- *Fighting Words.* Words directed to another individual or individuals that an ordinary and reasonable person should be aware are likely to cause a fight or breach of the peace are prohibited under the **fighting words** doctrine. In *Chaplinsky v. New Hampshire,* the Supreme Court upheld the conviction of a member of the Jehovah's Witnesses who, when distributing religious pamphlets, attacked a local marshal with the accusation that "you are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."
- *Incitement to Violent Action.* A speaker, when addressing an audience, is prohibited from **incitement to violent action.** In *Feiner v. New York,* Feiner addressed a racially mixed crowd of seventy-five or eighty people. He was described as "endeavoring to arouse" the African Americans in the crowd "against the whites, urging that they rise up in arms and fight for equal rights." The Supreme Court ruled that "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."[35] On the other hand, in *Terminello v. Chicago,* the Supreme Court stressed that a speaker could not be punished for speech that merely "stirs to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[36]
- *Threat. A* developing body of law prohibits threats of bodily harm directed at individuals. Judges must weigh and balance a range of factors in determining whether a statement constitutes a political exaggeration or a **true threat.** In *Watts v. United States,* the defendant proclaimed to a small gathering following a public rally on the grounds of the Washington Monument that if inducted into the army and forced to carry a rifle that "the first man I want to get in my sights is L.B.J. [President Lyndon Johnson] . . . They are not going to make me kill my black brothers." The onlookers greeted this statement with laughter. Watts's conviction was overturned by the U.S. Supreme Court, which ruled that the government had failed to demonstrate that Watts had articulated a true threat and that these types of bold statements were to be expected in a dynamic and democratic society divided over the Vietnam War.[37]
- *Obscenity.* Obscene materials are considered to lack "redeeming social importance" and are not accorded constitutional protection. Drawing the line between obscenity and protected speech has proven problematic. The Supreme Court conceded that obscenity cannot be defined with "God-like precision," and Justice Potter Stewart went so far as to pronounce in frustration that the only viable test seemed to be that he "knew obscenity when he saw

it."[38] The U.S. Supreme Court was finally able to agree on a test for obscenity in *Miller v. California*. The Supreme Court declared that **obscenity** was limited to works that, when taken as a whole, in light of contemporary community standards, appeal to the prurient interest in sex; are patently offensive; and lack serious literary, artistic, political, or scientific value. This qualification for scientific works means that a medical textbook portraying individuals engaged in "ultimate sexual acts" likely would not constitute obscenity.[39] Child pornography may be limited despite the fact that it does not satisfy the *Miller* standard.[40] (Obscenity and pornography are discussed in Chapter 15.)

- *Libel*. You should remain aware that the other major limitation on speech, **libel,** is a civil law rather than a criminal action. This enables individuals to recover damages for injury to their reputations. In *New York Times v. Sullivan,* the U.S. Supreme Court severely limited the circumstances in which public officials could recover damages and held that a public official may not recover damages for a defamatory falsehood relating to his or her official conduct "unless . . . the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[41] The Court later clarified that this "reckless disregard" or actual knowledge standard applied only to "public figures" and that states were free to apply a more relaxed, simple negligence (lack of reasonable care in verifying the facts) standard in suits for libel brought by private individuals.[42]

Speech lacking First Amendment protection shares several common characteristics:

- The expression lacks social value.
- The expression directly causes social harm or injury.
- The expression is narrowly defined in order to avoid discouraging and deterring individuals from engaging in free and open debate.

Keep in mind that these are narrowly drawn exceptions to the First Amendment's commitment to a lively and vigorous societal debate. The general rule is that the government may neither require nor substantially interfere with individual expression. The Supreme Court held in *West Virginia v. Barnette* that a student may not be compelled to pledge allegiance to the American flag. The Supreme Court observed that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or action their faith therein." This commitment to a free "marketplace of ideas" is based on the belief that delegating the decision as to what "views shall be voiced largely into the hands of each of us" will "ultimately produce a more capable citizenry and more perfect polity and . . . that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[43]

Overbreadth

The doctrine of **overbreadth** is an important aspect of First Amendment protection. This provides that a statute is unconstitutional that is so broadly and imprecisely drafted that it encompasses and prohibits a substantial amount of protected speech relative to the coverage of the statute. In *New York v. Ferber,* the U.S. Supreme Court upheld a New York child pornography statute that criminally punished an individual for promoting a "performance which includes sexual conduct by a child less than sixteen years of age." Sexual conduct was defined to include "lewd exhibition of the genitals." Justice Byron White was impatient with the concern that, although the law was directed at hardcore child pornography, "[s]ome protected expression ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." White doubted whether these applications of the statute to protected speech constituted more than a "tiny fraction of the materials" that would be affected by the law, and he expressed confidence that prosecutors would not bring actions against these types of publications. This, in short, is the "paradigmatic case of state statute whose legitimate reach dwarfs its arguably impermissible applications."[44]

Hate Speech

Hate speech is one of the central challenges confronting the First Amendment. This is defined as speech that denigrates, humiliates, and attacks individuals on account of race, religion, ethnicity,

nationality, gender, sexual preference, or other personal characteristics and preferences. Hate speech should be distinguished from hate crimes or penal offenses that are directed against an individual who is a member of one of these "protected groups."

The United States is an increasingly diverse society in which people inevitably collide, clash, and compete over jobs, housing, and education. Racial, religious, and other insults and denunciations are hurtful, increase social tensions and divisions, and possess limited social value. This type of expression also has little place in a diverse society based on respect and regard for individuals of every race, religion, ethnicity, and nationality.

Regulating this expression, on the other hand, runs the risk that artistic and literary depictions of racial, religious, and ethnic themes may be deterred and denigrated. In addition, there is the consideration that debate on issues of diversity, affirmative action, and public policy may be discouraged. Society benefits when views are forced out of the shadows and compete in the sunlight of public debate.

The most important U.S. Supreme Court ruling on hate speech is *R.A.V. v. St. Paul.* In *R.A.V.,* several Caucasian juveniles burned a cross inside the fenced-in yard of an African American family. The young people were charged under two statutes, including the St. Paul Bias Motivated Crime Ordinance (St. Paul Minn. Legis. Code § 292.02), which provided that "whoever places on public or private property a symbol, object, including and not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender commits disorderly conduct . . . shall be guilty of a misdemeanor."[45]

The Supreme Court noted that St. Paul punishes certain fighting words, yet permits other equally harmful expressions. This discriminates against speech based on the content of ideas. For instance, what about symbolic attacks against a greedy real estate developer?

A year later, in *Wisconsin v. Mitchell,* in 1993, the Supreme Court ruled that a Wisconsin statute that enhanced the punishment of individuals convicted of hate crimes did not violate the defendant's First Amendment rights. Todd Mitchell challenged a group of other young African American males by asking whether they were "hyped up to move on white people." As a young Caucasian male approached the group, Mitchell exclaimed "there goes a white boy; go get him" and led a collective assault on the victim. The Wisconsin court increased Mitchell's prison sentence for aggravated assault from a maximum of two years to a term of four years based on his intentional selection of the person against "whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[46]

Mitchell creatively claimed that he was being punished more severely for harboring and acting on racially discriminatory views in violation of the First Amendment. The Supreme Court, however, ruled that Mitchell was being punished for his harmful act rather than for the fact that his act was motivated by racist views. The enhancement of Mitchell's sentence was recognition that acts based on discriminatory motives are likely "to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Mitchell also pointed out that the prosecution was free to introduce a defendant's prior racist comments at trial to prove a discriminatory motive or intent and that this would "chill" racist speech. The Supreme Court held that it was unlikely that a citizen would limit the expression of his or her racist views based on the fear that these statements would be introduced one day against him or her at a prosecution for a hate crime.

In 2003, in *Virginia v. Black,* the U.S. Supreme Court held unconstitutional a Virginia law prohibiting cross burning with "an intent to intimidate a person or group of persons."[47] This law, unlike the St. Paul statute, did not discriminate on the basis of the content of the speech. The Court, however, determined that the statute's provision that the jury is authorized to infer an intent to intimidate from the act of burning of a cross without any additional evidence "permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense." This provision also makes "it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." The Virginia law failed to distinguish between cross burning intended to intimidate individuals and cross burning intended to make a political statement by groups such as the Ku Klux Klan that view the flaming cross as a symbolic representation of their political point of view.

In the next case in the text, *George T. v. California,* the California Supreme Court was asked to determine whether a student who wrote a poem that stated that he may be the "next kid to bring guns to kill students at school" constituted a "true threat."

Was George's poem a criminal threat?

George T. v. California, *93 P.3D 1007 (CAL. 2004), Opinion by: Moreno, J.*

Issue

We consider in this case whether a high school student made a criminal threat by giving two classmates a poem labeled "Dark Poetry," which read in part,

> I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!

Facts

Fifteen-year-old George T. (minor) had been a student at Santa Teresa High School in Santa Clara County for approximately two weeks when on Friday, March 16, 2001, toward the end of his honors English class, he approached fellow student Mary S. and asked her, "Is there a poetry class here?" Minor then handed Mary three sheets of paper and told her, "Read these." Mary did so. The first sheet of paper contained a note stating, "These poems describe me and my feelings. Tell me if they describe you and your feelings." The two other sheets of paper contained poems. Mary read only one of the poems, which was labeled "Dark Poetry" and entitled "Faces":

> Who are these faces around me? Where did they come from? They would probably become the next doctors or loirs [sic] or something. All really intelligent and ahead in their game. I wish I had a choice on what I want to be like they do. All so happy and vagrant. Each original in their own way. They make me want to puke. For I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!! by: Julius AKA Angel

Minor had a "straight face," not "show[ing] any emotion, neither happy or sad or angry or upset," when he handed the poems to Mary. Upon reading the "Faces" poem, Mary became frightened, handed the poems back to minor, and immediately left the campus in fear. After she informed her parents about the poem, her father called the school, but it was closed. Mary testified she did not know minor well, but they were on "friendly terms." When asked why she felt minor gave her the poem to read, she responded, "I thought maybe because the first day he came into our class, I approached him because that's the right thing to do" and because she continued to be nice to him.

After Mary handed the poems back to minor, minor approached Erin S. and Natalie P., students minor had met during his two weeks at Santa Teresa High School. Erin had been introduced to minor a week prior and had subsequently spoken with him on only three or four occasions, whereas Natalie considered herself minor's friend and had come to know him well during their long afterschool conversations, which generally lasted from an hour to an hour and a half and included discussions of poetry. Minor handed Erin a "folded up" piece of paper and asked her to read it. He also handed a similarly folded piece of paper to Natalie, who was standing with Erin. Because Erin was late for class, she only pretended to read the poem to be polite but did not actually read it. She placed the unread poem in the pocket of her jacket.

The next day, Saturday, Mary e-mailed her English teacher William Rasmussen to report her encounter with minor. A substitute teacher had been teaching the class on the day that Mary received the note. She wrote,

> I'm sorry to bother you over the weekend, but I don't think this should wait until Monday. During 6th period on Friday, 3/16, the guy in our class called Julius (actually his name is Theodore?) gave me two poems to read. He explained to me that these poems "described him and his feelings," and asked if I "felt the same way." I was surprised to find that the poems were about how he is "nice on the outside," and how he's "going to be the next person to bring a gun to school and kill random people." I told him to bring the poems to Room 315 to Ms. Gonzalez because [she] is in charge of poetry club. He said he would but I don't know for sure if he did.

Mary remained in fear throughout the weekend, because she understood the poem to be personally threatening to her, as a student. Asked why she felt the poem was a threat, Mary responded,

> It's obvious he thought of himself as a dark, destructive, and dangerous person. And if he was willing to admit that about himself and then also state that he could be the next person to bring guns and kill students, then I'd say that he was threatening.

She understood the term "dark poetry" to mean "angry threats; any thoughts that aren't positive." Rasmussen called Mary on Sunday regarding her e-mail.

Mary sounded very shaken during the conversation, and based on this and on what she stated about the contents of the poem, Rasmussen contacted the school principal and the police. He read "Faces" for the first time during the jurisdictional hearing and, upon reading it, felt personally threatened by it, because, according to Rasmussen, "He's saying he's going to come randomly shoot." His understanding of "dark poetry" was that it entailed "the concept of death and causing and inflicting a major bodily pain and suffering. . . . There is something foreboding about it."

On Sunday, March 18, 2001, officers from the San Jose Police Department went to minor's uncle's house, where minor and his father were residing. An officer asked minor, who opened the door when the officers arrived, whether there were any guns in the house. Minor "nodded." Minor's uncle was surprised that minor was aware of his guns, and handed the officers a .38-caliber handgun and a rifle. When asked about the poems disseminated at school, minor handed an officer a piece of paper he took from his pocket. The paper contained a poem entitled, "Faces in My Head," which read as follows:

> Look at all these faces around me. They look so vacant. They have their whole lives ahead of them. They have their own individuality. Those kind of people make me wanna puke. For I am a slave to very evil masters. I have no future that I choose for myself. I feel as if I am going to go crazy. Probably I would be the next high school killer. A little song keeps playing in my head. My daddy is worth a dollar not even 100 cents. As I look at these faces around me I wonder why r [sic] they so happy. What do they have that I don't. Am I the only one with the messed up mind. Then I realize, I'm cursed!!

As with the poem entitled "Faces," this poem was labeled "dark poetry," but it was not shown or given to anyone at school. Minor had drafted "Faces in My Head" that morning in an attempt to capture what he had written in "Faces," because he wanted a copy for his poetry collection. Minor was taken into custody.

Police officers went to the school the following Monday to investigate the dissemination of the poem. Erin was summoned to the vice-principal's office and asked whether minor had given her any notes. She responded in the affirmative, realized that the poem was still in the pocket of her jacket, and retrieved it. The paper contained a poem entitled "Faces," which was the same poem given to Mary. Upon reading the poem for the first time in the vice-principal's office, Erin became terrified and broke down in tears, finding the poem to be a personal threat to her life. She testified that she was not in the poetry club and had no interest in the subject.

Natalie, who testified on behalf of minor, recalled that minor said, "Read this" as he handed her and Erin the pieces of paper. The folded-up sheet of paper Natalie received contained a poem entitled, "Who Am I." When a police officer went to Natalie's home to inquire about the poem minor had given her on Friday, Natalie was not completely cooperative and truthful, telling the officer that the poem was about water and dolphins and that she believed it was a love poem. The police retrieved the poem from Natalie's trash can and although it was torn, some of it could still be deciphered:

> . . . I created? . . . cause it really . . . feel as if . . . stolen from . . . of peace . . . Taken to a place that you hate. Your locked up and when your let out of your cage it is to perform. Not able to be yourself and always hiding & thinking would people like me if I behaved differently? by Julius AKA Angel.

Natalie did not feel threatened by the poem; rather it made her "feel sad," because "it was kind of lonely." She testified that "dark poetry is . . . relevant to like pure emotions, like sadness, loneliness, hate or just like pure emotions. Sometimes it tells a story, like a dark story." Based on her extended conversations with minor, Natalie found him to be "mild and calm and very serene" and did not consider him to be violent.

Minor testified the poem "Faces" was not intended to be a threat, and, because Erin and Natalie were his friends, he did not think they would have taken his poems as such. He thought of poetry as art and stated that he was very much interested in the subject, particularly as a medium to describe "emotions instead of acting them out." He wrote "Faces" during his honors English class on the day he showed it to Mary and Erin. Minor was having a bad day as a consequence of having forgotten to ask his parents for lunch money and having to forgo lunch that day, and because he was unable to locate something in his backpack. He had many thoughts going through his head, so he decided to write them down as a way of getting them out. The poem "Who Am I," which was given to Natalie, was written the same day as "Faces," but was written during the lunch period. Neither poem was intended to be a threat. Instead they were "just creativity."

Minor and his friends frequently joked about the school shootings at Columbine High School in Colorado (where, in 1999, two students killed twelve fellow students and one faculty member). They would jokingly say, "I'm going to be the next Columbine kid." Minor testified that Natalie and Erin had been present when he and some of his friends had joked about Columbine, with someone stating that "I'll probably be the next Columbine killer," and indicating who would be killed and who would be spared. Given this history, minor believed Natalie and Erin would understand the poems as jokes.

The poems were labeled "dark poetry" to inform readers that they were exactly that, and minor testified,

> If anybody was supposed to read this poem, or let's say if my mom ever found my poem or something of that nature, I would like them to know that it was dark poetry. Dark poetry is usually just an expression. It's creativity. It is not like you're actually going to do something like that, basically.

Asked why he wrote, "for I can be the next kid to bring guns to school and kill students," minor responded,

> The San Diego killing [on March 5, 2001, a student at Santana High School shot and killed two students and wounded thirteen others] was about right around this time. So since I put the three Ds—dark, destructive, and dangerous—and since I said—"I am evil," and since I was talking about people around me—faces—how I said, like, how they would make me want to—did I say that?—well, even if I didn't—yeah, I did say that. Okay. So, um, I said from all these things, it sounds like, for I can be the next Columbine kid, basically. So why not add that in? And so, "Parents, watch your children, because I'm back," um, I just wanted to—kind of like a dangerous ending, like a—um, just like ending a poem that would kind of get you, like,—like, whoa, that's really something.

Minor stated that he did not know Mary and did not give her any poems. However, he was unable to explain how Mary was able to recount the contents of the "Faces" poem.

On cross-examination, minor conceded that he had had difficulties in his two previous schools, including being disciplined for urinating on a wall at his first school and had been asked to leave his second school for plagiarizing from the Internet. He explained that the urination incident was caused by a doctor-verified bladder problem. He denied having any ill will toward the school district, but he conceded when pressed by the prosecutor that he felt the schools "had it in for me."

An amended petition under Welfare and Institutions Code section 602 was filed against minor, alleging minor made three criminal threats in violation of Penal Code section 422. The victims of the alleged threats were Mary (count 1), Erin (count 3), and Rasmussen (count 2).

Following a contested jurisdictional hearing, the juvenile court found true the allegations with respect to Mary and Erin but dismissed the allegation with respect to Rasmussen. At the hearing, the court adjudicated minor a ward of the court and ordered a 100-day commitment in juvenile hall. Minor appealed, challenging the sufficiency of the evidence to support the juvenile court's finding that he made criminal threats. Over a dissent, the court of appeal affirmed the juvenile court in all respects with the exception of remanding the matter for the sole purpose of having that court declare the offenses to be either felonies or misdemeanors. We granted review and now reverse.

Reasoning

We made clear that not all threats are criminal and enumerated the elements necessary to prove the offense of making criminal threats under section 422. The prosecution must prove

> (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.

Minor challenges the juvenile court's findings that he made criminal threats in violation of section 422 and contends that his First Amendment rights were infringed by the court's conclusion that his poem was a criminal threat.

In cases raising First Amendment issues, [it has] repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." The current version of section 422 was drafted with the mandates of the First Amendment in mind, incorporating language from a federal appellate court true-threat decision:

> . . . to describe and limit the type of threat covered by the statute. Independent review is particularly important in the threat's context, because it is a type of speech that is subject to categorical exclusion from First Amendment protection, similar to obscenity, fighting words, and incitement of imminent lawless action. "What is a threat must be distinguished from what is constitutionally protected speech."

As discussed above, this court . . . enumerated five elements the prosecution must prove in order to meet its burden of proving that a criminal threat was uttered. Minor challenges the findings with respect to two of the five elements, contending that the poem "was [not] 'on its face and under the circumstances in which it [was

disseminated] so unequivocal, unconditional, immediate, and specific as to convey to [Mary and Erin] a gravity of purpose and an immediate prospect of execution of the threat'" and that the facts fail to establish he harbored the specific intent to threaten Mary and Erin.

With respect to the requirement that a threat be "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat," we explained that the word "so" in Section 422 meant that "'unequivocality,' 'unconditionality,' 'immediacy' and 'specificity' are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances. . . . The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim." A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning.

With the above considerations in mind, we examine the poem at issue—"Faces." What is readily apparent is that much of the poem plainly does not constitute a threat. "Faces" begins by describing the protagonist's feelings about the "faces" that surround him:

> Where did they come from? They would probably become the next doctors or loirs [sic] or something. All really intelligent and ahead in their game. I wish I had a choice on what I want to be like they do. All so happy and vagrant. Each original in their own way. They make me want to puke.

These lines convey the protagonist's feelings about the students around him and describe his envy over how happy and intelligent they appear to be, with opportunities he does not have. There is no doubt this portion of the poem fails to convey a criminal threat, as no violent conduct whatsoever is expressed or intimated. Neither do the next two lines of the poem convey a threat: "For I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!!" These lines amount to an introspective description of the protagonist, disclosing that he is "destructive," "dangerous," and "evil." But again, such divulgence threatens no action.

Only the final two lines of the poem could arguably be construed to be a criminal threat: "For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!" Mary believed this was a threat, but her testimony reveals that her conclusion rested upon a considerable amount of interpretation:

> I feel that when he said, "I can be the next person," that he meant that he will be, because also he says that he's dark, destructive, and dangerous person. And I'd describe a dangerous person as someone who has something in mind of killing someone or multiple people.

The juvenile court's finding that minor threatened to kill Mary and Erin likewise turned primarily on its interpretation of the words, "For I can be the next kid to bring guns to kill students at school" to mean not only that minor could do so, but that he would do so. In other words, the court construed the word "can" to mean "will." But that is not what the poem says. However the poem was interpreted by Mary and Erin and the court, the fact remains that "can" does not mean "will." While the protagonist in "Faces" declares that he has the potential or capacity to kill students given his dark and hidden feelings, he does not actually threaten to do so. While perhaps discomforting and unsettling, in this unique context this disclosure simply does not constitute an actual threat to kill or inflict harm.

As is evident, the poem "Faces" is ambiguous and plainly equivocal. It does not describe or threaten future conduct, because it does not state that the protagonist plans to kill students, or even that any potential victims would include Mary or Erin. Such ambiguity aside, it appears that Mary actually misread the text of the poem. In her e-mail to Rasmussen, she stated that the poem read, "He's 'going to be the next person to bring a gun to school and kill random people.'" She did not tell Rasmussen that this was her interpretation of the poem but asserted that those were the words used by minor. Given the student killings in Columbine and Santee, this may have been an understandable mistake, but it does not alter the requirement that the words actually used must constitute a threat in light of the surrounding circumstances.

The court of appeal rejected minor's contention that the protagonist in the poem was a fictional character rather than minor, because he gave the poem to Mary with a note stating that the poem described "me and my feelings." There is no inconsistency, however, in viewing the protagonist as a fictional character while also concluding that the poem reflects minor's personal feelings. And when read by another person, the poem may similarly describe that reader's feelings, as minor implied when he asked Mary if the poem also "described [her] and [her] feelings." More important, the note is consistent with the contention that the poem did nothing more than describe certain dark feelings. The note asked whether Mary had the same feelings; it did not state or imply something to the effect of, "This is what I plan to do; are you with me?" (Of course, exactly what the poem means is open to varying interpretations, because a poem may mean different things to different readers.)

As a medium of expression, a poem is inherently ambiguous. In general, "reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are," which means they "are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory." Ambiguity in poetry is sometimes intended: "'Ambiguity' itself can mean an indecision as to what you mean, an intention to mean several things, a probability that one or the other or both

of two things has been meant, and the fact that a statement has several meanings." As the court of appeal observed in a case involving a painting graphically depicting a student shooting a police officer in the back of the head, "a painting—even a graphically violent painting—is necessarily ambiguous because it may use symbolism, exaggeration, and make-believe." This observation is equally applicable to poetry, since it is said that "painting is silent poetry, and poetry painting that speaks."

In short, viewed in isolation the poem is not "so unequivocal" as to have conveyed to Mary and Erin a gravity of purpose and an immediate prospect that minor would bring guns to school and kill them. Ambiguity, however, is not necessarily sufficient to immunize the poem from being deemed a criminal threat, because the surrounding circumstances may clarify facial ambiguity. As Section 422 makes clear, a threat must "on its face and under the circumstances in which it is made, [be] so unequivocal, unconditional, immediate, and specific as to convey . . . a gravity of purpose and an immediate prospect of execution of the threat." When the words are vague, context takes on added significance, but care must be taken not to diminish the requirements that the communicator have the specific intent to convey a threat and that the threat be of such a nature as to convey a gravity of purpose and immediate prospect of the threat's execution.

Unlike some cases that have turned on an examination of the surrounding circumstances given a communication's vagueness, incriminating circumstances in this case are noticeably lacking: there was no history of animosity or conflict between the students . . . no threatening gestures or mannerisms accompanied the poem . . . and no conduct suggested to Mary and Erin that there was an immediate prospect of execution of a threat to kill. Thus the circumstances surrounding the poem's dissemination fail to show that, as a threat, it was sufficiently unequivocal to convey to Mary and Erin an immediate prospect that minor would bring guns to school and shoot students.

The themes and feelings expressed in "Faces" are not unusual in literature:

> Literature illuminates who 'we' are: the repertory of selves we harbor within, the countless feelings we experience but never express or perhaps even acknowledge, the innumerable other lives we could but do not live, all those 'inside' lives that are not shown, not included in our resumes.[48]

"Faces" was in the style of a relatively new genre of literature called "dark poetry" that . . . is an extension of the poetry of Sylvia Plath, John Berryman, Robert Lowell, and other confessional poets who depict "extraordinarily mean, ugly, violent, or harrowing experiences." Consistent with that genre, "Faces" invokes images of darkness, violence, discontentment, envy, and alienation. The protagonist describes his duplicitous nature—malevolent on the inside, felicitous on the outside.

Holding

For the foregoing reasons, we hold the poem entitled "Faces" and the circumstances surrounding its dissemination fail to establish that it was a criminal threat, because the text of the poem, understood in light of the surrounding circumstances, was not "so unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat." Our conclusion that the poem was not an unequivocal threat disposes of the matter and we need not, and do not, discuss minor's contention that he did not harbor the specific intent to threaten the students, as required by Section 422.

This case implicates two apparently competing interests: a school administration's interest in ensuring the safety of its students and faculty versus students' right to engage in creative expression. Following Columbine, Santee, and other notorious school shootings, there is a heightened sensitivity on school campuses to latent signs that a student may undertake to bring guns to school and embark on a shooting rampage. Such signs may include violence-laden student writings. For example, the two student killers at Columbine had written poems for their English classes containing "extremely violent imagery." Ensuring a safe school environment and protecting freedom of expression, however, are not necessarily antagonistic goals.

Minor's reference to school shootings and his dissemination of his poem in close proximity to the Santee school shooting no doubt reasonably heightened the school's concern that minor might emulate the actions of previous school shooters. Certainly, school personnel were amply justified in taking action following Mary's e-mail and telephone conversation with her English teacher, but that is not the issue before us. We decide here only that minor's poem did not constitute a criminal threat.

For the foregoing reasons, we reverse the judgment of the court of appeal.

Concurring, *Baxter, J.*

Applying the independent review standard proper for cases implicating First Amendment interests, I agree the evidence does not establish this specific element. The writing, in the form of a poem, that defendant handed to Mary S. and Erin S. said that the protagonist, "Julius AKA Angel," "can be the next kid to bring guns to kill students at school." It did not say, in so many words, that defendant presently intended to do so. And the surrounding circumstances did not lend unconditional meaning to this conditional language. That said, there is no question that defendant's ill-chosen words were menacing by any common understanding, both on their face and in context. The terror they elicited in Mary S., and the concern they evoked in the school authorities, were real and entirely reasonable. It is safe to say that fears arising from a raft of high school shooting rampages, including those in Colorado and Santee, California, are

prevalent among American high school students, teachers, and administrators. Certainly this was so on March 16, 2001, only eleven days after the Santee incident had occurred. That is the day defendant selected to press his violent writing on two vulnerable and impressionable young schoolmates who hardly knew him. Defendant admitted at trial that he intentionally combined the subject matter and the timing for maximum shock value. Indeed, he acknowledged, his words would be interpreted as threats by "kids who didn't know [he was] just kidding."

Under these circumstances, as the majority observe, school and law enforcement officials had every reason to worry that defendant, deeply troubled, was contemplating his own campus killing spree. The important interest that underlies the criminal-threat law—protection against the trauma of verbal terrorism—was also at stake. Accordingly, the authorities were fully justified, and should be commended, insofar as they made a prompt, full, and vigorous response to the incident. They would have been remiss had they not done so. Nothing in our very narrow holding today should be construed as suggesting otherwise.

Questions for Discussion

1. Summarize the facts in *George T.*
2. Describe the responses of Mary, Erin, and Natalie to George T.'s poem. What occurred when the police confronted George T. and conducted an investigation at George T.'s school?
3. What are the elements of the crime of a "true threat" under Section 422 of the California Penal Code?
4. Why did the California Supreme Court conclude that George T.'s poem did not constitute a clear threat? Did the court fully consider the circumstances surrounding the threat? Should the court have analyzed whether George T. intended to harm other students?
5. Do you think that the supreme court's decision was influenced by the fact that George T. was juvenile and that the alleged threat was contained in a "poem"? Note that a number of prominent writers viewed George T.'s prosecution as a violation of artistic freedom and urged the court to dismiss the charges against George T. Would the court have ruled differently if the poem had stated clearly that George T. planned to return to school with a gun? What if George T. had expressed the sentiments in the letter directly to various students and teachers?
6. Does the California Supreme Court's focus on specific words lead the court to overlook that the poem was interpreted as a threat by Mary and Erin?
7. Do you agree with the California Supreme Court's ruling that George T.'s poem is protected speech under the First Amendment?

Cases and Comments

Flag Burning. In *Texas v. Johnson,* the U.S. Supreme Court addressed the constitutionality of Texas Penal Code Annotated section 42.09 (1989), which punished the intentional or knowing desecration of a "state or national flag." Desecration under the statute was interpreted as to "efface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

Johnson participated in a political demonstration during the Republican National Convention in Dallas in 1984. The purpose was to protest the policies of the Reagan administration and certain Dallas-based corporations and to dramatize the consequences of nuclear war. The demonstrators gathered in front of the Dallas City Hall, where Johnson unfurled an American flag, doused the flag with kerosene, and set it on fire. The demonstrators chanted "America, the red, white, and blue, we spit on you" as the flag burned. None of the participants was injured or threatened retribution.

Justice Brennan observed that the Supreme Court had recognized that conduct may be protected under the First Amendment where there is an intent to convey a particularized message and there is a strong likelihood that this message will be understood by observers. Justice Brennan observed that the circumstances surrounding Johnson's burning of the flag resulted in his message being "both intentional and overwhelmingly apparent." In those instances in which an act contains both communicative and noncommunicative elements, the standard in judging the constitutionality of governmental regulation of *symbolic speech* is whether the government has a substantial interest in limiting the nonspeech element (the burning).

The Supreme Court rejected Texas's argument that the statute was a justified effort to preserve the flag as a symbol of nationhood and national unity. This would permit Texas to "prescribe what is orthodox by saying that one may burn the flag . . . only if one does not endanger the flag's representation of nationhood and national unity." In the view of the majority, Johnson was being unconstitutionally punished based on the ideas he communicated when he burned the flag. See *Texas v. Johnson,* 491 U.S. 397 (1989).

In 1989, the U.S. Congress adopted the Flag Protection Act, 19 U.S.C. § 700. The act provided that anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a U.S. flag shall be subject to both a fine and imprisonment for

not more than one year. This law exempted the disposal of a worn or soiled flag. The U.S. government asserted an interest in preserving the flag as "emblematic of the Nation as a sovereign entity." In *United States v. Eichman,* Justice Brennan failed to find that this law was significantly different from the Texas statute in *Johnson* and ruled that the law "suppresses expression out of concern for its likely communicative impact." Justice Stevens, in a dissent joined by Justices Rehnquist, White, and O'Connor, argued that the government may protect the symbolic value of the flag and that this does not interfere with the speaker's freedom to express his or her ideas by other means. He noted that various types of expression are subject to regulation. For example, an individual would not be free to draw attention to a cause through a "gigantic fireworks display or a parade of nude models in a public park." See *United States v. Eichman,* 496 U.S. 310 (1990).

See more cases on the study site: Virginia v. Black *and* People v. Rokicki, *www.sagepub.com/lippmanccl2e*

You Decide

2.3 Lori MacPhail, a police officer in Chico, California, assigned to a high school, observed Ryan D. with some other students off campus during school hours. She conducted a pat down and discovered that Ryan possessed marijuana and issued him a citation.

Roughly a month later, Ryan turned in an art project for a painting class at the high school. The projects generally are displayed in the classroom for as long as two weeks. Ryan's painting pictured an individual who appeared to be a juvenile wearing a green hooded sweatshirt discharging a handgun at the back of the head of a female peace officer with badge No. 67 (Officer MacPhail's number) and the initials CPD (Chico Police Department). The officer had blood on her hair and pieces of her flesh and face were blown away. An art teacher saw the painting and found it to be "disturbing" and "scary," and an administrator at the school informed Officer MacPhail.

An assistant principal confronted Ryan, who stated the picture depicted his "anger at police officers" and that he was angry with MacPhail and agreed that it was "reasonable to expect that Officer MacPhail would eventually see the picture." Ryan was charged with a violation of section 422 and brought before juvenile court.

How would you rule? See *In re Ryan D.,* 123 Cal. Rptr. 2d 193 (Cal. App. 2002).

You can find the answer at www.sagepub.com/lippmanccl2e

Privacy

The idea that there should be a legal right to **privacy** was first expressed in an 1890 article in the *Harvard Law Review* written by Samuel D. Warren and Louis D. Brandeis, who was later appointed to the U.S. Supreme Court. The two authors argued that the threats to privacy associated with the dawning of the twentieth century could be combated through recognition of a civil action (legal suit for damages) against individuals who intrude into individuals' personal affairs.[49]

In 1905, the Supreme Court of Georgia became the first court to recognize an individual's right to privacy when it ruled that the New England Life Insurance Company illegally used the image of artist Paolo Pavesich in an advertisement that falsely claimed that Pavesich endorsed the company.[50] This decision served as a precedent for the recognition of privacy by courts in other states.

For a deeper look at this topic, visit the study site.

The Constitutional Right to Privacy

A constitutional right to privacy was first recognized in *Griswold v. Connecticut in* 1965. The U.S. Supreme Court proclaimed that although privacy was not explicitly mentioned in the U.S. Constitution, it was implicitly incorporated into the text. The case arose when Griswold, along with Professor Buxton of Yale Medical School, provided advice to married couples on the prevention of procreation through contraceptives. Griswold was convicted of being an accessory to the violation of a Connecticut law that provided that any person who uses a contraceptive shall be fined not less than $50 or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.[51]

Justice William O. Douglas noted that although the right to privacy was not explicitly set forth in the Constitution, this right was "created by several fundamental constitutional guarantees." According to Justice Douglas, these fundamental rights create a "zone of privacy" for individuals. In a famous phrase, Justice Douglas noted that the various provisions of the Bill of Rights possess "penumbras, formed by emanations from those guarantees . . . [that] create zones of privacy." Justice Douglas cited a number of constitutional provisions that together create the right to privacy.

The right of association contained in the penumbra of the First Amendment is one; the Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment's Self-Incrimination Clause "enables the citizen to create a zone of privacy that Government may not force him to surrender to his detriment." The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In contrast, Justice Arthur Goldberg argued that privacy was found within the Ninth Amendment, and Justice Harlan contended that privacy is a fundamental aspect of individual "liberty" within the Fourteenth Amendment.

We nevertheless should take note of Justice Hugo Black's dissent in *Griswold* questioning whether the Constitution provides a right to privacy, a view that continues to attract significant support. Justice Black observed that "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade [my privacy] unless prohibited by some specific constitutional provision."

The right to privacy recognized in *Griswold* guarantees that we are free to make the day-to-day decisions that define our unique personality: what we eat, read, and watch; where we live and how we spend our time, dress, and act; and with whom we associate and work. In a totalitarian society, these choices are made by the government, but in the U.S. democracy, these choices are made by the individual. The courts have held that the right to privacy protects several core concerns:

- *Sanctity of the Home*. Freedom of the home and other personal spaces from arbitrary governmental intrusion
- *Intimate Activities*. Freedom to make choices concerning personal lifestyle and an individual's body and reproduction
- *Information*. The right to prevent the collection and disclosure of intimate or incriminating information to private industry, the public, and governmental authorities
- *Public Portrayal*. The right to prevent your picture or endorsement from being used in an advertisement without permission or to prevent the details of your life from being falsely portrayed in the media[52]

In short, as noted by Supreme Court Justice William Brandeis, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[53]

There are several key Supreme Court decisions on privacy.

In *Eisenstadt v. Baird,* in 1971, the Supreme Court extended *Griswold* and ruled that a Massachusetts statute that punished individuals who provided contraceptives to unmarried individuals violated the right to privacy. Justice William Brennan wrote that "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[54]

The Supreme Court, in *Carey v. Population Services International,* next declared a New York law unconstitutional that made it a crime to provide contraceptives to minors and for anyone other than a licensed pharmacist to distribute contraceptives to persons over fifteen. Justice Brennan noted that this imposed a significant burden on access to contraceptives and impeded the "decision whether or not to beget or bear a child" that was at the "very heart" of the "right to privacy."[55]

In 1973, in *Roe v. Wade,* the U.S. Supreme Court ruled unconstitutional a Texas statute that made it a crime to "procure an abortion." Justice Blackmun wrote that the "right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[56] The Supreme Court later ruled that Pennsylvania's requirement that a woman obtain her husband's consent unduly interfered with her access to an abortion.[57]

The zone of privacy also was extended to an individual's intellectual life in the home in *Stanley v. Georgia*. A search of Stanley's home for bookmaking paraphernalia led to the seizure of three reels of film portraying obscene scenes. Justice Marshall concluded that "whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[58]

The Constitutional Right to Privacy and Same-Sex Relations Between Consenting Adults in the Home

Privacy, however appealing, lacks a clear meaning. Precisely what activities are within the right of privacy in the home? In answering this question, we must balance the freedom to be left alone against the need for law and order. The issue of sodomy confronted judges with the question of whether laws upholding sexual morality must yield to the demands of sexual freedom within the home.

In *Bowers v. Hardwick,* the Supreme Court affirmed Hardwick's sodomy conviction under a Georgia statute. Justice White failed to find a fundamental right deeply rooted in the nation's history and tradition to engage in acts of consensual sodomy, even when committed in the privacy of the home. He pointed out that sodomy was prohibited by all thirteen colonies at the time the constitution was ratified, and twenty-five states and the District of Columbia continued to criminally condemn this conduct.[59]

Bowers v. Hardwick was reconsidered in 2003, in *Lawrence v. Texas,* the next case in the textbook. Was the Supreme Court ready to recognize that the right to privacy included the fundamental right of two consenting males to engage in sodomy within the privacy of the home?

Do consenting adults have the right to engage in sodomy within the home?

Lawrence v. Texas, *539 U.S. 558 (2003), Opinion by: Kennedy, J.*

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

Facts

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a justice of the peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The applicable state law is Texas Penal Code Annotated section 21.06(a) (2003). It provides, "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object."

The petitioners exercised their right to a trial . . . in Harris County Criminal Court. They challenged the statute as a violation of the United States and Texas constitutions. These contentions were rejected. The petitioners, having entered a plea of ***nolo contendere*** (a plea of guilt limited to these proceedings and not constituting an admission of guilt for purposes of other legal actions), were each fined $200 and assessed court costs of $141.25.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process clauses of the Fourteenth Amendment . . . [and] rejected the constitutional arguments and affirmed the convictions. . . .

Issue

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

Reasoning

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with

another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. . . .

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said, "Proscriptions against that conduct have ancient roots." In academic writings, and in many of the scholarly . . . briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times, there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such, but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a nineteenth-century treatise addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, nineteenth-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, nineteenth-century evidence rules imposed a burden that would make a conviction more difficult to obtain, even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. The rule may explain in part the infrequency of these prosecutions. In all events, that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers*

decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the twentieth century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place.

It was not until the 1970s that any state singled out same-sex relations for criminal prosecution, and only nine states have done so (Arkansas, Kansas, Missouri, Montana, Nevada, Oklahoma, Tennessee, Texas, and Kentucky). Post-*Bowers* even some of these states did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, states with same-sex prohibitions have moved toward abolishing them. . . .

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated. It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." . . . In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. In 1961 Illinois changed its laws to conform to the Model Penal Code. Other states soon followed.

In *Bowers* the Court referred to the fact that before 1961 all 50 states had outlawed sodomy, and that at the time of the Court's decision, 24 states and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades.

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. Parliament enacted the substance of those recommendations ten years later. Of even more importance, almost five years before *Bowers* was decided, the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. . . . The Court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Authoritative in all countries that are members of the Council of Europe (twenty-one nations then, forty-five nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The twenty-five states with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to thirteen, of which four enforce their laws only against homosexual conduct. In those states where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons. The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal

convictions. . . . We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question, the convicted person would come within the registration laws of at least four states were he or she to be subject to their jurisdiction (Idaho, Louisiana, Mississippi, and South Carolina). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

In the United States, criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. The courts of five different states have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment. To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has not followed *Bowers*. . . . Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. . . . There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. When a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. The holding in *Bowers,* however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

Holding

This case involves two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. . . . The times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Dissenting, *Scalia, J.,* with whom *Rehnquist, C. J.,* and *Thomas, J.,* join

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable,"—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. . . . This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.

Today's opinion is the product of a court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their businesses, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their homes. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination," which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-antihomosexual culture that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream" and that in most states what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal. . . .

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining states that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will

is something else. I would no more require a state to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best. . . . If moral disapprobation of homosexual conduct is no legitimate state interest for the purposes of proscribing this conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution?" Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

Dissenting, *Thomas, J.*

If I were a member of the Texas Legislature, I would vote to repeal it [this law]. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources. . . . [But] just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution] a general right of privacy," or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions."

Questions for Discussion

1. What is the evidence that the Supreme Court relies on to find that individuals possess a fundamental right to engage in sodomy in the home? Are you persuaded by Justice Kennedy's arguments?
2. Why did the Supreme Court overturn its decision in *Bowers?*
3. Does *Lawrence* provide a precedent for the legalization of drug use or the possession of child pornography in the privacy of the home?
4. Was Justice Kennedy concerned that maintaining the criminal status of homosexual sodomy might lead to the singling out of homosexuals for discrimination and registration as sexual offenders? Would it have been preferable for the Supreme Court to have declined to hear this case and leave each state free to address sodomy in accordance with its established procedures? Should the Court legislate public policy for the entire country? For Texas?

See more cases on the study site: Utah v. Holm, *www.sagepub.com/lippmanccl2e*

Cases and Comments

Voyeurism. On April 26, 1999, Sean Glas used a camera to take pictures underneath the skirts of two women working at the Valley Mall in Union Gap, Washington. In one instance, Inez Mosier was working the women's department at Sears and saw a light flash out of the corner of her eye. She turned around to discover Glas squatting on the floor a few feet behind her. She noticed a small, silver camera in his hand. The police later confiscated the film and discovered photos of the undergarments of Mosier and another woman. Richard Sorrells, in a separate case, was apprehended after using a video camera to film the undergarments of women and young girls at the "Bite of Seattle" at the Seattle Center. Both Glas and Sorrells were convicted of voyeurism for taking photos underneath women's skirts ("upskirt" voyeurism). The Washington voyeurism statute reads (Revised Code of Washington 9A.44.115(1)(b)(i),(ii)),

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views photographs or films of another person, without that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

The statute defines a place in which a person would have a reasonable expectation of privacy as a place where a "reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being filmed by another," or as a "place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." The Washington Supreme Court interpreted a location where an individual may "disrobe in privacy" to include the bedroom, bathroom, dressing room, or tanning salon. A location in which an individual may reasonably expect to be safe from intrusion or surveillance includes the other rooms in an individual's home as well as locations where

someone would not normally disrobe, but would not expect others to intrude, such as a private suite or office.

The court acquitted the two defendants, ruling that although Glas and Sorrells engaged in "disgusting and reprehensible behavior," Washington's voyeurism statute "does not apply to actions taken in purely public places and hence does not prohibit the 'upskirt' photographs" taken by Glas and Sorrells. Do you agree that the women had no expectation of privacy? See *Washington v. Glas,* 54 P.3d 147 (Wash. 2002).

You Decide

2.4 In September 2001, defendant Dr. Jack Kevorkian injected Youk with a lethal dose of poison. Youk suffered from ALS and signed a consent form requesting Kevorkian to take this step to alleviate Youk's "intolerable and hopelessly incurable suffering." During the prior two years, Youk found that he could not move his left arm or his legs, had minimal use of his right arm, and experienced difficulty swallowing and breathing. He was fed through a tube and was required to use a machine to help him breathe. Kevorkian was convicted of second-degree murder and sentenced to between ten and twenty-five years in prison. Kevorkian appealed on the grounds that Youk had exercised his right to privacy to be free from suffering. Kevorkian explained to television journalist Mike Wallace that "this could never be a crime in any society which deems itself enlightened." Would you affirm Kevorkian's conviction? See *People v. Kevorkian,* 639 N.W.3d 291 (Mich. App. 2001).

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

The United States is a constitutional democracy. The government's power to enact laws is constrained by the constitution. These limits are intended to safeguard the individual against the passions of the majority and the tyrannical tendencies of government. The restrictions on government also are designed to maximize individual freedom, which is the foundation of an energetic and creative society and dynamic economy. Individual freedom, of course, must be balanced against the need for social order and stability. We all have been reminded that "you cannot yell fire in a crowded theater." This chapter challenges you to locate the proper balances among freedom, order, and stability.

The rule of legality requires that individuals receive notice of prohibited acts. The ability to live your life without fear of unpredictable criminal punishment is fundamental to a free society. The rule of legality provides the philosophical basis for the constitutional prohibition on bills of attainder and *ex post facto* laws. Bills of attainder prohibit the legislative punishment of individuals without trial. *Ex post facto* laws prevent the government from criminally punishing acts that were innocent when committed. The constitutional provision for due process insures that individuals are informed of acts that are criminally condemned and that definite standards are established that limit the discretion of the police. An additional restriction on criminal statutes is the Equal Protection Clause. This prevents the government from creating classifications that unjustifiably disadvantage or discriminate against individuals; a particularly heavy burden is imposed on the government to justify distinctions based on race or ethnicity. Classifications on gender are subject to intermediate scrutiny. Other differentiations are required only to meet a rational basis test.

Freedom of expression is of vital importance in American democracy, and the Constitution protects speech that some may view as offensive and disruptive. Courts may limit speech only in isolated situations that threaten social harm and instability. The right to privacy protects individuals from governmental intrusion into the intimate aspects of life and creates "space" for individuality and social diversity to flourish.

This chapter provided you with the constitutional foundation of American criminal law. Keep this material in mind as you read about criminal offenses and defenses in the remainder of the textbook. We will look at the Eighth Amendment prohibition on cruel and unusual punishment in Chapter 3.

Chapter Review Questions

1. Explain the philosophy underlying the United States' constitutional democracy. What are the reasons for limiting the powers of state and federal government to enact criminal legislation? Are there costs as well as benefits in restricting governmental powers?
2. Define the rule of legality. What is the reason for this rule?
3. Define and compare bills of attainder and *ex post facto* laws. List the various types of *ex post facto* laws. What is the reason that the U.S. Constitution prohibits retroactive legislation?

4. Explain the standards for laws under the Due Process Clause.
5. Why does the U.S. Constitution protect freedom of expression? Is this freedom subject to any limitations?
6. What is the difference among the "rational basis," "intermediate scrutiny," and "strict scrutiny" tests under the Equal Protection Clause?
7. Where is the right to privacy found in the U.S. Constitution? What activities are protected within this right?
8. Write a short essay on the constitutional restrictions on the drafting and enforcement of criminal statutes.
9. As a final exercise, consider life in a country that does not provide safeguards for civil liberties. How would your life be changed?

Legal Terminology

bill of attainder
Bill of Rights
constitutional democracy
equal protection
ex post facto law
fighting words
First Amendment
hate speech
incitement to violent action
incorporation theory
intermediate level of scrutiny
libel
minimum level of scrutiny test
nolo contendere
nullum crimen sine lege, nulla poena sine lege
obscenity
overbreadth
privacy
rational basis test
rule of legality
strict scrutiny
true threats
void for vagueness

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Learn about the range of First Amendment issues on the site of the First Amendment Center. Research an issue that interests you.
2. You can read the actual oral argument before the U.S. Supreme Court in *Lawrence v. Texas* on the Website of the U.S. Supreme Court.

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3 Punishment and Sentencing

May Missouri legally execute seventeen-year-old murderer Christopher Simmons?

Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below. . . . Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face . . ."

Core Concepts and Summary Statements

Introduction

In the last decade the United States has experienced a shift from indeterminate to determinate sentencing.

Punishment

A. The legal test for punishment considers various factors, including legislative intent, whether the type of penalty has historically been considered punishment, the degree of restraint on an individual's liberty, the purpose of the penalty, whether intent is required, and whether the conduct being punished has traditionally been viewed as criminal.
B. Whether a statute is considered to impose a civil disability or criminal punishment can have important consequences.

Purposes of Punishment

The purposes of punishment include retribution, deterrence, rehabilitation, incapacitation, and restoration.

Sentencing

A judge may sentence an individual convicted of a crime to imprisonment, fines, probation, intermediate sanctions, or capital punishment.

Evaluating Sentencing Schemes

Several considerations may prove useful in evaluating sentencing schemes. These include proportionality, individualism, disparity, predictability, and simplicity.

Approaches to Sentencing

There are various approaches to sentencing, including determinate sentences, mandatory minimums, indeterminate sentences, presumptive sentences, and presumptive sentencing guidelines.

Sentencing Guidelines

A. Determinate has replaced indeterminate sentencing as the primary approach in the United States. This reflects a shift from rehabilitation to retribution, deterrence, incapacitation, and treatment of offenders.
B. Sentencing guidelines provide for a presumptive sentence that reflects the gravity of the offense and offender history. There may be a downward or upward departure from this presumptive sentence based on mitigating or aggravating factors.
C. Recent Supreme Court decisions have resulted in these guidelines being considered advisory rather than binding.

Truth in Sentencing

"Truth in sentencing" requires that prisoners serve a significant percent of their sentence. The federal government provides funds to construct prisons to states that guarantee that prisoners serve at least eighty-five percent of their sentences.

Victims' Rights

The "victims' rights" movement has resulted in provisions in federal and state laws to compensate for injuries, expenses, and restitution. It also provides for the right of victims to be informed of developments in regards to the prosecution and sentencing of offenders and the right to participate in the trial through victim impact statements.

Eighth Amendment

A. The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. This

clause limits the methods employed to inflict punishment, restricts the "amount of punishment" that may be imposed, and prohibits the criminal punishment of certain acts.

B. The Eighth Amendment is not limited to punishments that were prohibited at the time of the adoption of the Eighth Amendment and draws its meaning from evolving standards of decency.

C. The death penalty, also called capital punishment, is not prohibited. Capital punishment, however, is restricted to murder in which aggravating factors outweigh mitigating factors. The administration of the death penalty is subject to various procedures intended to ensure that capital punishment is imposed in a proportionate fashion.

D. Courts generally have held that state and federal statutes providing for punishment for a "term of years," such as Three Strikes and You're Out laws and laws specifying the length of sentences for drug offenses, are proportionate to the offender's crime.

E. Under the Eighth Amendment, individuals are to be punished for their criminal acts rather than for their personal status.

Equal Protection

A judge may not base a criminal sentence on a defendant's race, gender, religion, ethnicity, or nationality. A defendant seeking to establish that a statute that is "neutral on its face" is in fact a violation of equal protection must demonstrate both a discriminatory intent and a discriminatory impact.

Introduction

One of the primary challenges confronting any society is to ensure that people follow the legal rules that protect public safety and security. This is partially achieved through the influence of families, friends, teachers, the media, and religion. Perhaps the most powerful method to persuade people to obey legal rules is through the threat of criminal punishment. Following a defendant's conviction, the judge must determine the appropriate type and length of the sentence. The sentence typically reflects the purpose of the punishment. A penalty intended to exact revenge will result in a harsher punishment than a penalty designed to assist an offender to "turn his or her life around."

An American judge in colonial times and during the early American republic was able to select from a wide array of punishments, most of which were intended to inflict intense pain and public shame. A Virginia statute of 1748 punished the stealing of a hog with twenty-five lashes and a fine. The second offense resulted in two hours of pillory (public ridicule) or public branding. A third theft resulted in a penalty of death. False testimony during a trial might result in mutilation of the ears or banishment from the colony. These penalties were often combined with imprisonment in a jail or workhouse and hard labor. You should keep in mind that minor acts of insubordination by African American slaves resulted in swift and harsh punishment without trial. Between 1706 and 1784, 550 African slaves were sentenced to death in Virginia alone.[1]

We have slowly moved away from most of these physically painful sanctions. The majority of states followed the example of the U.S. Congress, which in 1788 prohibited federal courts from imposing whipping and standing in the pillory. Maryland retained corporal punishment until 1953, and Delaware repealed this punishment only in 1972. Delaware, in fact, subjected more than 1,600 individuals to whippings in the twentieth century.[2] This practice was effectively ended in 1968, when the Eighth Circuit Court of Appeals ruled that the use of the strap "offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess."[3] In 1994, President Bill Clinton and twenty-four U.S. senators wrote the president of Singapore in an unsuccessful effort to persuade him to make an "enlightened decision" and to halt plans to subject an American teenager charged with vandalism to four lashings with a rattan rod.[4]

In the United States, courts have attempted to balance the need for swift and forceful punishment with the recognition that individuals are constitutionally entitled to fair procedures and are to be free from cruel and unusual punishments. You should be familiar with several central concerns when you complete the study of this chapter:

- the definition of punishment,
- justifications for punishment,
- the types of sentences that may be imposed by judges,
- the considerations employed to evaluate the merits of sentencing schemes,
- the approaches to sentencing in federal and state courts, and
- the constitutional standards that must be met by criminal sentences.

You should also come away from this chapter with an understanding that sentencing policies have evolved over time. Disillusionment with flexible sentences and rehabilitation led to the development of sentencing guidelines and determinate sentences that are intended to ensure uniform and fixed sentences that fit the crime. The federal and state governments also adopted "truth in sentencing" laws that assure the public that defendants are serving a significant portion of their prison terms. These developments have been accompanied by a growing concern for victims.

The central point that you should appreciate is that the United States is witnessing a revolution in sentencing. Keep the following points in mind:

- *Purpose of Punishment.* The emphasis is on deterrence, retribution, incapacitation, education, and treatment of offenders rather than on rehabilitation.
- *Judicial Discretion.* Judicial discretion in sentencing is greatly reduced. The federal government and states have introduced sentencing guidelines and mandatory minimum sentences, illustrated by Three Strikes and You're Out legislation and drug laws.
- *Truth in Sentencing.* The authority of parole boards to release prisoners prior to the completion of their sentences and the ability of incarcerated individuals to accumulate "good time" is vastly reduced as a result of truth in sentencing legislation. As a consequence, offenders are serving a greater percentage of their sentences.
- *Victims.* Victims are being provided a greater role and more protections in the criminal justice process.
- *Death Penalty.* The death penalty does not violate the Eighth Amendment. Capital punishment, however, is subject to a number of constitutional limitations under the Eighth Amendment intended to ensure that death is a penalty proportionate to the offender's crime.
- *Terms of Years.* Courts have deferred to the decisions of state legislatures and the Congress in regards to sentencing decisions and generally have held that prison sentences are proportionate to the offender's crime.
- *Equal Protection.* Courts have ruled that sentencing decisions and statutes based on race or gender violate the Equal Protection Clause.

The larger point to consider as you read this chapter is whether we have struck an appropriate balance among the interests of society, defendants, and victims in the sentencing process. You should make an effort to develop your own theory of punishment.

Punishment

Professor George P. Fletcher writes that the central characteristic of a criminal law is that a violation of the rule results in punishment before a court. Whether an act is categorized as a criminal as opposed to a civil violation is important, because a criminal charge triggers various constitutional rights, such as a right against double jeopardy, the right to a lawyer, the right not to testify at trial, and the right to a trial by a jury.[5] Would the quarantine of individuals during a flu pandemic be considered a civil disability or a criminal penalty? The U.S. Supreme Court has listed various considerations that determine whether a law is criminal.[6]

- Does the legislature characterize the penalty as civil or criminal?
- Has the type of penalty imposed historically been viewed as criminal?
- Does the penalty involve a significant disability or restraint on personal freedom?
- Does the penalty promote a purpose traditionally associated with criminal punishment?
- Is the imposition of the penalty based on an individual's intentional wrongdoing, a requirement that is central to criminal liability?
- Has the prohibited conduct traditionally been viewed as criminal?

Whether a law is considered to impose criminal punishment can have important consequences for a defendant. For instance, in *Smith v. Doe,* the U.S. Supreme Court was asked to decide whether Alaska's sex registration law constituted *ex post facto* criminal punishment.

In 1994, the U.S. Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act that makes certain federal criminal justice funding dependent

on a state's adoption of a sex offender registration law. By 1996, every state, the District of Columbia, and the federal government had enacted some type of **Megan's Law.** These statutes were named in memory and honor of Megan Kanka, a seven-year-old New Jersey child who had been sexually assaulted and murdered in 1994 by a neighbor who, unknown to Megan's family, had prior convictions for sexual offenses against children.[7]

Alaska adopted a retroactive law that required both convicted sex offenders and child kidnappers to register and keep in contact with local law enforcement authorities. Alaska provided nonconfidential information to the public on the Internet, including an offender's crime, address, place of employment, and photograph.

Supreme Court Justice Anthony Kennedy, in his majority opinion in *Smith v. Doe,* agreed with Alaska that this statute was intended to protect the public from the danger posed by sexual offenders through the dissemination of information, and that the law was not intended to constitute and did not constitute unconstitutional *ex post facto* (retroactive) criminal punishment.[8]

Justice Ruth Ginsburg dissented from the majority judgment affirming the constitutionality of the Alaska statute. She observed that placing a registrant's face on a Web site under the label "Registered Sex Offender" was reminiscent of the shaming punishment that was employed during the colonial era when individuals were branded or placed in stocks and subjected to public ridicule.

Justice Ginsburg pointed out that John Doe I, one of the individuals bringing this case, had been sentenced to prison for sexual abuse nine years before the passage of the Alaska statute. He successfully completed a rehabilitation program and gained early release on supervised probation. John Doe subsequently remarried, established a business, and gained custody of one of his daughters based on a judicial determination that he no longer posed a threat. The Alaska version of Megan's Law now required John Doe I "to report personal information to the State four times per year," and permitted the state publicly to label him a registered sex offender for the rest of his life.

Justice Ginsburg's argument that Megan's Law constitutes *ex post facto* punishment would render Alaska helpless to alert citizens to the continuing danger posed by sex offenders convicted prior to the passage of Megan's Law. Does Justice Ginsberg overlook the fact that, although registrants must inform authorities of changes in appearance, employment, and address, these individuals remain free to live their lives without restraint or restriction and can hardly claim to have been punished? On the other hand, there was evidence that registrants were scorned by the community, experienced difficulties in employment and housing, and encountered hostility. However, this resulted from the acts of members of the public rather than the government.

The next section briefly outlines the purposes or goals that are the basis of sentencing in the criminal justice system. These purposes include retribution, deterrence, rehabilitation, incapacitation, and restoration.

Purposes of Punishment

In the United States, we have experienced various phases in our approach to criminal punishment. We continue to debate whether the primary goal of punishment should be to assist offenders to turn their lives around or whether the goal of punishment should be to safeguard society by locking up offenders. Some rightly point out that we should not lose sight of the need to require offenders to compensate crime victims. In considering theories of punishment, ask yourself what goals should guide our criminal justice system.

Retribution

Retribution imposes punishment based on **just deserts.** Offenders should receive the punishment that they deserve based on the seriousness of their criminal acts. The retributive philosophy is based on the familiar biblical injunction of "an eye for an eye, a tooth for a tooth." Retribution assumes that we all know right from wrong and are morally responsible for our conduct and should be held accountable. The question is what punishment is "deserved": a prison term, a fine, or confinement? How do we determine the appropriate length of a prison sentence and in what type of institution the sentence should be served? This is not always clear, because what an individual "deserves" may depend on the circumstances of the crime, the background of the victim, and the offender's personal history.

Deterrence

The theory of **specific deterrence** imposes punishment to deter or discourage a defendant from committing a crime in the future. Critics note that the recidivism rate indicates that punishment rarely deters crime. Also, we once again confront the challenge of determining the precise punishment required to achieve the desired result, in this case to deter an individual from returning to a life of crime. **General deterrence** punishes an offender as an example to deter others from violating the law. Critics contend that offenders have little concern or awareness of the punishment imposed on other individuals and that even harsh punishments have little general deterrent effect. Others reply that swift and certain punishment sends a powerful message, and that a credible threat of punishment constitutes a deterrent. There are also objections to punishing an individual as an example to others, because this may result in a harsher punishment than is required to deter the defendant from committing another crime.

Rehabilitation

The original goal of punishment in the United States was to reform the offender and to transform him or her into a law-abiding and productive member of society. **Rehabilitation** appeals to the idealistic notion that people are essentially good and can transform their lives when encouraged and given support. However, studies cast doubts on whether prison educational and vocational programs are able to rehabilitate inmates. Reformers, on the other hand, point out that rehabilitation has never been seriously pursued and requires a radically new approach to imprisonment.

Incapacitation

The aim of **incapacitation** is to remove offenders from society to prevent them from continuing to menace others. This approach accepts that there are criminally inclined individuals who cannot be deterred or rehabilitated. The difficulty with this approach is that we lack the ability to accurately predict whether an individual poses a continuing danger to society. As a result, we may incapacitate an individual based on a faulty prediction of what he or she may do in the future rather than for what he or she did in the past. **Selective incapacitation** singles out offenders who have committed designated offenses for lengthy incarceration. In many states, a conviction for a drug offense or a second or third felony under a Three Strikes and You're Out law results in a lengthy prison sentence or life imprisonment. There is continuing debate over the types of offenses that merit selective incapacitation.

Restoration

Restoration stresses the harm caused to victims of crime and requires offenders to engage in financial restitution and community service to compensate the victim and the community and to "make them whole once again." The restorative justice approach recognizes that the needs of victims are often overlooked in the criminal justice system. This approach is also designed to encourage offenders to develop a sense of individual responsibility and to become responsible members of society.

This discussion of the purposes of punishment is not mere academic theorizing. Judges, when provided with the opportunity to exercise discretion, are guided by these purposes in determining the appropriate punishment. For example, in a New York case, the court described Dr. Bernard Bergman as a man of "unimpeachably high character, attainments and distinction" who is respected by people around the world for his work in religion, charity, and education. Bergman's desire for money apparently drove him to fraudulently request payment from the U.S. government for medical treatment that he had not provided to nursing home patients. He entered guilty pleas to fraud charges in both New York and federal courts and argued that he should not be imprisoned, because he did not require "specific deterrence."

Judge Marvin Frankel recognized in his judgment that there was little need for incapacitation and doubted whether imprisonment could provide useful rehabilitation. Nevertheless, he imposed a four-month prison sentence, explaining that this is "a stern sentence. For people like Dr. Bergman who might be disposed to engage in similar wrongdoing, it should be sufficiently frightening to serve the . . . [purpose] of general deterrence." Judge Frankel also explained that the

four-month sentence served the interest in retribution and that "for all but the profoundly vengeful, [the sentence] should not depreciate the seriousness of his offenses." [9] Do you agree with Judge Frankel's reasoning and sentence?

Sentencing

Various types of punishments are available to judges. These punishments often are used in combination with one another:

- *Imprisonment.* Individuals sentenced to a year or less are generally sentenced to local jails. Sentences for longer periods are typically served in state or federal prisons.
- *Fines.* State statutes usually provide for fines as an alternative to incarceration or in addition to incarceration.
- *Probation.* Probation involves the suspension of a prison sentence so long as an individual continues to report to a probation officer and to adhere to certain required standards of personal conduct. For instance, this may entail psychiatric treatment or a program of counseling for alcohol or drug abuse. The conditions of probation are required to be reasonably related to the rehabilitation of the offender and the protection of the public.
- *Intermediate Sanctions.* This includes house arrest with electronic monitoring, short-term "shock" incarceration, community service, and restitution. Intermediate sanctions may be imposed as a criminal sentence, as a condition of probation, following imprisonment, or in combination with a fine.
- *Death.* Thirty-five states and the federal government provide the death penalty for homicide. The other states provide life without parole.

We should also note that the federal government and most states provide for **assets forfeiture** or seizure pursuant to a court order of the fruits of illegal narcotics transactions (along with certain other crimes) or of the instrumentalities that were used in such activity. The burden rests on the government to prove by a preponderance of the evidence that instrumentalities (vehicles), profits (money), or property are linked to an illegal transaction. In *United States v. Ursery,* the U.S. Supreme Court held that the seizure of money and property did not constitute double jeopardy, because forfeitures do not constitute punishment.[10]

The U.S. Department of Justice reported in 2004 that state and federal courts convicted almost 1,145,000 adults of felonies. State courts accounted for 1,079,000 of these convictions. Seventy percent of individuals convicted in state courts were sentenced to prison, and thirty percent were sentenced to probation with no jail time. The average sentence for felons sentenced to state prisons was fifty-seven months; the average probation sentence was thirty-eight months. Individuals sentenced to local jails, on average, received a six-month sentence. Thirty-three percent of convicted felons were ordered to pay fines, and roughly eighteen percent were required to pay restitution. Thirty percent were required to undergo some form of treatment, perform community service, or satisfy some other requirement.

Evaluating Sentencing Schemes

As you read about various approaches to sentencing in the remainder of the chapter, keep several considerations in mind that might prove useful in evaluating the merits of a particular approach.

- *Proportionality.* A sentence should fit the crime.
- *Individualism.* A sentence should reflect the offender's criminal history and the threat posed to society.
- *Disparity.* The sentences for a particular offense should be uniform; like cases should be treated alike.
- *Predictability and Simplicity.* The sentence to be imposed for a particular offense should be clear and definite and should not be dependent on the personality or biases of the judge. It should be relatively easy for a judge to determine the appropriate sentence.

- *Excessiveness*. A sentence should not inflict unnecessary and needless pain and suffering.
- *Truthfulness*. An offender's sentence should reflect the actual time served in prison.
- *Purpose*. A sentence should be intended to achieve one or more of the purposes of punishment.

Clearly no single approach can achieve each of these goals.

Approaches to Sentencing

The approach to sentencing in states historically has shifted in response to the prevailing criminal justice thought and philosophy. The federal and state governments generally follow four different approaches to sentencing offenders. Criminal codes may incorporate more than a single approach.

- **Determinate Sentences.** The state legislature provides judges with little discretion in sentencing and specifies that the offender is to receive a specific sentence. A shorter or longer sentence may be given to an offender, but this must be justified by the judge.
- **Mandatory Minimum Sentences.** The legislature requires judges to sentence an offender to a minimum sentence, regardless of mitigating factors. Prison sentences in some jurisdictions may be reduced by good-time credits earned by the individual while incarcerated.
- **Indeterminate Sentences.** The state legislature provides judges with the ability to set a minimum and maximum sentence within defined limits. In some jurisdictions, the judge possesses discretion only to establish a maximum sentence. The decision to release an inmate prior to fully serving his or her sentence is vested in a parole board.
- **Presumptive Sentencing Guidelines.** A legislatively established commission provides a sentencing formula based on various factors, stressing the nature of the crime and the offender's criminal history. Judges may be strictly limited in terms of discretion or may be provided with some flexibility within established limits. The judge must justify departures from the presumptive sentence on the basis of various aggravating and mitigating factors that are listed in the guidelines. Appeals are provided in order to maintain reasonable sentencing practices in those instances in which a judge departs from the presumptive sentence in the guidelines.

An individual convicted of multiple crimes may be given **consecutive sentences,** meaning that the sentences for each criminal act are served one after another. In the alternative, **concurrent sentences** are served at the same time.

Governors and, in the case of federal offenses, the President of the United States, may grant an offender **clemency,** resulting in a reduction of an individual's sentence or in a commutation of a death sentence to life in prison. A **pardon** exempts an individual from additional punishment. The U.S. Constitution, in Article II, Section 2, authorizes the president to pardon "offenses against the United States." In 2004, former Illinois Governor George Ryan concluded that the problems in the administration of the death penalty risked the execution of an innocent and responded by pardoning four individuals on death row and commuting the sentences of over one hundred individuals to life in prison.

Sentencing Guidelines

At the turn of the twentieth century, most states and the federal government employed indeterminate sentencing. The legislature established the outer limits of the penalty, and parole boards were provided with the authority to release an individual prior to the completion of his or her sentence in the event the offender demonstrated that he or she had been rehabilitated. This approach is based on the belief that an individual who is incarcerated will be inspired to demonstrate that he or she no longer poses a threat to society and deserves an early release. The disillusionment with the notion of rehabilitation and the uncertain length and extreme variation in the time served by offenders led to the introduction of determinate sentences.

In 1980, Minnesota adopted sentencing guidelines in an effort to provide for uniform proportionate and predictable sentences. Currently over a dozen states employ guidelines. In 1984,

the U.S. Congress responded by passing the Sentencing Reform Act. The law went into effect in 1987 and established the U.S. Sentencing Commission, which drafted binding guidelines to be followed by federal judges in sentencing offenders. The Sentencing Commission is composed of seven members appointed by the president with the approval of the U.S. Senate. At least three of the members must be federal judges. The Sentencing Commission has the responsibility to monitor the impact of the guidelines on sentencing and to propose needed modifications.[11]

The Sentencing Reform Act abandoned rehabilitation as a purpose of imprisonment. The goals are retribution, deterrence, incapacitation, and the education and treatment of offenders. All sentences are determinate, and an offender's term of imprisonment is reduced only by any good-behavior credit earned while in custody.

Sentences under the federal guidelines are based on a complicated formula that reflects the seriousness and characteristics of the offense and the criminal history of the offender. The judge employs a sentencing grid and is required to provide a sentence within the narrow range where the offender's criminal offense and criminal history intersect on the grid.

Judges are required to document the reasons for criminal sentences and are obligated to provide a specific reason for an upward or downward departure. The prosecution may appeal a sentence below the presumed range and the defense any sentence above the presumed range. This process can be incredibly complicated and requires the judge to undertake as many as seven separate steps. The federal guidelines also specify that any **plea bargain** (a negotiated agreement between defense and prosecuting attorneys) must be approved by a judge to ensure that any sentence agreed upon is within the range established by the guidelines. The impact of the guidelines is difficult to measure, but studies suggest that the guidelines have increased the percentage of defendants who receive prison terms.

The federal guidelines are much more complicated than most state guidelines and provide judges with much less discretion in sentencing. Experts conclude that as a result of several recent Supreme Court cases, federal as well as state sentencing guidelines should now be considered merely advisory rather than binding on judges. These complicated and confusing legal decisions, outlined as follows, hold that it is unconstitutional to enhance a sentence based on facts found to exist by the judge by a **preponderance of the evidence** (a probability) rather than **beyond a reasonable doubt** by a jury. According to the Supreme Court, excluding the jury from the fact-finding process constitutes a violation of a defendant's Sixth Amendment right to trial by a jury of his or her peers. In *Apprendi v. New Jersey,* the U.S. Supreme Court explained that to "guard against . . . oppression and tyranny on the part of rulers, and as the great bulwark of [our] . . . liberties, trial by jury has been understood to require that 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'"[12]

In *Blakely v. Washington,* decided in 2004, Blakely pled guilty to kidnapping his wife. The judge followed Washington's sentencing guidelines and found that Blakely had acted with "deliberate cruelty" and imposed an "exceptional" sentence of ninety months rather than the standard sentence of fifty-three months. The U.S. Supreme Court ruled that a judge's sentence is required to be based on "the facts reflected in the jury verdict or admitted by the defendant" and that a judge may not enhance a sentence based on facts that were not determined by the jury to exist.[13]

The decisions in *Apprendi* and in *Blakely* were relied on by the Supreme Court in *Cunningham v. California* to hold unconstitutional California's determinate sentencing law (DSL). Cunningham was tried and convicted of the continuous sexual abuse of a child under the age of fourteen. Under the DSL, the offense is punishable by imprisonment for a lower term of six years, a middle term of twelve years, or an upper term sentence of sixteen years. The judge was obligated to sentence Cunningham to the twelve-year middle term unless the judge found one or more additional facts in aggravation. The trial judge found six aggravating circumstances by a preponderance of the evidence that outweighed the single mitigating factor, and Cunningham was sentenced to sixteen years. The Supreme Court held that "fact finding to elevate a sentence . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard . . . [B]ecause the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment."[14]

In 2005, in *United States v. Booker,* the U.S. Supreme Court held that the enhancement of sentences by a judge under the federal sentencing guidelines unconstitutionally deprives defendants of their right to have facts determined by a jury of their peers. Booker was convicted of possession with intent to distribute at least fifty grams of crack cocaine. His criminal history and the quantity of drugs in his possession required a sentence of between 210 and 262 months in prison. The judge,

however, concluded by a preponderance of the evidence that Booker had possessed an additional 556 grams of cocaine and that he also was guilty of obstructing justice. These findings required the judge to select a sentence of between 360 months and life. The judge sentenced Booker to thirty years in prison. The Supreme Court ruled that the trial judge had acted unconstitutionally and explained that Booker had, in effect, been convicted of possessing a greater quantity of drugs than was charged in the indictment and that the determination of facts was a matter for the jury rather than for the judge. Justice Breyer concluded that the best course under the circumstances was for judges to view the guidelines as advisory rather than as requiring the selection of a particular sentence. Why? An advisory system enables judges to formulate a sentence without consulting with a jury. On the other hand, mandatory guidelines under the Supreme Court's decisions require the jury to find each fact on which a sentence is based beyond a reasonable doubt. A number of federal judges had publicly criticized the guidelines as unduly complicated and as limiting their discretion to impose more lenient sentences on deserving defendants and likely silently rejoiced over the Supreme Court's pronouncement that the guidelines should be considered as advisory rather than as binding.[15]

More recently, in *Rita v. United States, Gall v. United States,* and *Kimbrough v. United States,* the U.S. Supreme Court once again addressed the federal guidelines and explicitly held that the guidelines are advisory.[16] In these judgments, the Court held that an appellate court should examine whether a judge's sentencing decision, whether inside or outside the sentencing range in the guidelines, is reasonable. In other words, a trial court judge does not have to satisfy an extraordinarily high standard on appeal to justify a sentence that departs from the guidelines.

Truth in Sentencing

Whatever the fate of federal sentencing guidelines is, keep in mind that in 1984 the U.S. government moved from indeterminate to determinate sentencing. This was part of a general trend away from rehabilitation. A federal prisoner currently serves his or her complete sentence, only reduced by good-time credits earned while incarcerated. This replaces a system in which good-time credits and parole reduced a defendant's incarceration to roughly one-third of the sentence. Crime victims complained in frustration that the criminal justice system favored offenders over victims.

As part of this more open and honest approach to sentencing, the U.S. Congress championed **truth in sentencing laws.** What does this mean? The indeterminate sentencing model resulted in the release of prisoners prior to the completion of their sentences who succeeded in persuading parole boards that they had been rehabilitated. Truth in sentencing ensures that offenders serve a significant portion of the sentence. In the Violent Crime Control and Law Enforcement Act of 1994, Congress authorized the federal government to provide additional funds for prison construction and renovation to states that guarantee violent offenders serve eighty-five percent of their prison sentences. Roughly forty states have some form of truth in sentencing legislation and have qualified for funding. The result is that over seventy percent of violent offenders are serving longer sentences than they did prior to truth in sentencing.

Victims' Rights

Early tribal codes viewed criminal attacks as offenses against the victim's family or tribe. The family had the right to revenge or compensation. By the late Middle Ages, crime came to be viewed as an offense against the "King's Peace," which is the right of the monarch to insist on social order and stability within his realm. Government officials now assumed the responsibility to apprehend, prosecute, and punish offenders. The victim's interest was no longer of major consequence. In 1964, California passed legislation to assist victims, and today every state as well as the District of Columbia provides monetary payments to various categories of crime victims. The plans typically cover compensation for physical and emotional injuries and also provide restitution for medical care, lost wages, and living and burial expenses. Most states have statutes that authorize courts to require offenders to provide this restitution as part of their criminal sentence. Forty-three states have adopted so-called **Son of Sam** laws, named after a New York law directed at serial killer David Berkowitz. These laws prohibit convicted felons from profiting from books, films, or television programs that recount their crimes; instead, these laws make such funds available to victims.[17]

In 1986, the U.S. Congress passed the Victims of Crime Act (VOCA). This provides for a compensation fund and establishes the Office for Victims of Crime (OVC), which is responsible for coordinating all victim-related federal programs. President George W. Bush also signed the Crime Victims Rights Act of 2004, which proclaims various rights for crime victims, including the right to be informed of all relevant information involving the prosecution, imprisonment, and release of an offender as well as the right to compensation and return of property. California, along with nineteen other states, has adopted constitutional amendments protecting victims.

Another important development is the U.S. Supreme Court's approval of **victim impact statements** in death penalty cases. In *Payne v. Tennessee,* the defendant stabbed to death Charisse Christopher and her two-year-old daughter in front of Charisse's three-year-old son Nicholas. This was a particularly brutal crime; Charisse suffered eighty-four knife wounds and was left helplessly bleeding on the floor. The Supreme Court ruled that the trial court had acted properly in permitting Charisse's mother to testify during the sentencing phase of the trial that Nicholas continued to cry for his mother. The Court explained that the jury should be reminded that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." The federal government and an estimated twenty states have laws that authorize direct victim involvement at sentencing for criminal offenses, and all fifty states and the District of Columbia provide for some form of written submissions.[18]

In the next portion of the chapter, we will see that criminal sentences must satisfy the constitutional requirements of the Cruel and Unusual Punishment Clause of the Eighth Amendment and meet the requirements of equal protection that we discussed in Chapter 2.

Cruel and Unusual Punishment

The **Eighth Amendment** to the U.S. Constitution is the primary constitutional check on sentencing. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition on cruel and unusual punishment received widespread acceptance in the new American nation. In fact, the language in the U.S. Bill of Rights is taken directly from the Virginia Declaration of Rights of 1776, which in turn was inspired by the English Bill of Rights of 1689. The English document significantly limited the powers and prerogatives of the British monarchy and recognized certain basic rights of the English people.[19]

The U.S. Supreme Court has ruled that the prohibition against cruel and unusual punishment applies to the states as well as to the federal government, and virtually every state constitution contains similar language. Professor Wayne LaFave lists three approaches to interpreting the clause: (1) it limits the *methods* employed to inflict punishment, (2) it restricts the *amount of punishment* that may be imposed, and (3) it *prohibits* the criminal punishment of certain acts.[20]

Methods of Punishment

Patrick Henry expressed concern during Virginia's consideration of the proposed federal Constitution that the absence of a prohibition on cruel and unusual punishment would open the door to the use of torture to extract confessions. In fact, during the debate in the First Congress on the adoption of a Bill of Rights, one representative objected to the Eighth Amendment on the grounds that "villains often deserve whipping, and perhaps having their ears cut off."[21]

There is agreement that the Eighth Amendment prohibits punishment that was considered cruel at the time of the amendment's ratification, including burning at the stake, crucifixion, breaking on the wheel, drawing and quartering, the rack, and the thumbscrew.[22] The Supreme Court observed as early as 1890 that "if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."[23] In 1963, the Supreme Court of Delaware held that whipping was constitutionally permissible on the grounds that the practice was recognized in the state in 1776.[24]

The vast majority of courts have not limited cruel and unusual punishment to acts condemned at the time of passage of the Eighth Amendment and have viewed this as an evolving concept. The U.S. Supreme Court in *Trop v. Dulles* stressed that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[25]

Trop is an example of the application of the prohibition on cruel and unusual punishment to new situations. In *Trop,* the U.S. Supreme Court held that it was unconstitutional to deprive Trop and roughly 7,000 others convicted of military desertion of their American citizenship. Chief Justice Earl Warren wrote that depriving deserters of citizenship, although involving "no physical mistreatment," was more "primitive than torture" in that individuals are transformed into "stateless persons without the right to live, work or enjoy the freedoms accorded to citizens in the United States or in any other nation."

The death penalty historically has been viewed as a constitutionally acceptable form of punishment.[26] The Supreme Court noted that punishments are "cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. [Cruelty] implies there is something inhuman and barbarous—something more than the mere extinguishment of life."[27]

The Supreme Court has rejected the contention that death by shooting[28] and electrocution are cruel and barbarous, noting in 1890 that the newly developed technique of electricity was a "more humane method of reaching the result."[29] In *Louisiana ex rel. Francis v. Resweber,* Francis was strapped in the electric chair and received a bolt of electricity before the machine malfunctioned. The U.S. Supreme Court rejected the claim that subjecting the petitioner to the electric chair a second time constituted cruel and unusual punishment. The Court observed that there was no intent to inflict unnecessary pain, and the fact that "an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution."[30]

Judges have actively intervened to prevent barbarous methods of discipline in prison. In *Hope v. Pelzer,* in 2002, the U.S. Supreme Court ruled that Alabama's use of a "hitching post" to discipline inmates constituted "wanton and unnecessary pain." During Hope's seven-hour ordeal on the hitching post in the hot sun, he was painfully handcuffed at shoulder level to a horizontal bar without a shirt, taunted, and provided with water only once or twice and denied bathroom breaks. There was no effort to monitor the petitioner's condition despite the risks of dehydration and sun damage. The ordeal continued despite the fact that Hope expressed a willingness to return to work. The Supreme Court determined that the use of the hitching post was painful and punitive retribution that served no legitimate and necessary penal purpose.[31]

In judging whether a method of criminal punishment or prison discipline is cruel and unusual, courts consider the following:

- *Prevailing Social Values*. The punishment must be acceptable to society.
- *Penological Purpose*. The punishment must be strictly necessary to the achievement of a valid correctional goal, such as deterrence, rehabilitation, or incapacitation.
- *Human Dignity.* Individuals subject to the punishment must be treated with human respect and dignity.

There is an argument that individuals convicted of crimes have forfeited claims to humane treatment and that courts have gone too far in coddling criminals and in handcuffing state and local criminal justice professionals. According to individuals who adhere to this position, judges are too far removed from the realities of crime to appreciate that harsh penalties are required to deter crime and to control inmates. The debate over appropriate forms of punishment will likely continue as society moves toward utilizing alternative forms of social control. A number of states already authorize the chemical castration of individuals convicted of sexual battery, and some statutes also provide individuals with the option of surgically removing their testes.[32]

The next section explores whether capital punishment constitutes cruel and unusual punishment.

The Amount of Punishment: Capital Punishment

The prohibition on cruel and unusual punishment has also been interpreted to require that punishment is proportionate to the crime. In other words, the "punishment must not be excessive"; it must "fit the crime." Judges have been particularly concerned with the **proportionality** of the death penalty. This reflects an understandable concern that a penalty that is so "unusual in its pain, in its finality and in its enormity" is imposed in an "evenhanded, nonselective, and nonarbitrary" manner against individuals who have committed crimes deserving of death.[33]

In *Furman v. Georgia,* five Supreme Court judges wrote separate opinions condemning the cruel and unusual application of the death penalty against some defendants while others convicted of equally serious homicides were sentenced to life imprisonment. Justice Byron White reviewed the cases before the Supreme Court and concluded that there was "no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." Justice Potter Stewart observed in a concurring opinion that "these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[34]

For a deeper look at this topic, visit the study site.

Justice Douglas controversially concluded in *Furman* that the death penalty was being selectively applied against the poor, minorities, and uneducated at the same time privileged individuals convicted of comparable crimes were sentenced to life in prison. Justice Douglas argued that the United States' system of capital punishment operated in practice to exempt anyone making over $50,000 from execution, although "blacks, those who never went beyond the fifth grade in school, those who make less than $3,000 a year or those who were unpopular or unstable [were] the only people executed."

States reacted to this criticism by adopting mandatory death penalty laws that required that defendants convicted of intentional homicide receive the death penalty. The U.S. Supreme Court ruled in *Woodson v. North Carolina* that treating all homicides alike resulted in death being cruelly inflicted on undeserving defendants. The Court held that a jury "fitting the punishment to the crime" must consider the "character and record of the individual offender" as well as the "circumstances of the particular offense." The uniform system adopted in North Carolina treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subject to the blind infliction of the penalty of death."[35]

In *Gregg v. Georgia,* in 1976, the U.S. Supreme Court approved a Georgia statute designed to ensure the proportionate application of capital punishment. The Georgia law limited the discretion of jurors to impose the death penalty by requiring jurors to find that a murder had been accompanied by one of several aggravating circumstances. This evidence was to be presented at a separate sentencing hearing and was to be weighed against any and all mitigating considerations. Death sentences were to be automatically reviewed by the state supreme court, which was charged with ensuring that the verdict was supported by the facts and that capital punishment was imposed in a consistent fashion. This system was intended to ensure that the death penalty was reserved for the most severe homicides and was not "cruelly imposed on undeserving defendants."[36]

Were there offenses other than aggravated and intentional murder that merited the death penalty? What of aggravated rape? In *Coker v. Georgia,* in 1977, the U.S. Supreme Court ruled that death was a grossly disproportionate and excessive punishment for the aggravated rape of an adult and constituted cruel and unusual punishment.[37] Twenty-one years later, in *Kennedy v. Louisiana* (discussed in Crime in the News), the Supreme Court held that imposition of capital punishment for the rape of a child constituted cruel and unusual punishment.[38]

In 2008, the U.S. Supreme Court addressed the constitutionality of the execution of individuals through the use of lethal injection. In *Baze v. Rees,* the Court upheld the constitutionality of Kentucky's lethal injection protocol.[39] In 1977, Oklahoma passed the first lethal injection law. The law was motivated by the desire to find a less expensive and more humane method of execution. Thirty-five death penalty states along with the federal government presently provide for lethal injection. Nineteen states provide that lethal injection is the only method of execution. Between 1976 and 2006, 838 of the 1,016 executions in the United States were carried out by lethal injection. Three were carried out by the federal government and the remainder by the states. Thirty state correctional agencies employ the identical three-drug sequence of sodium thiopental, pancuronium bromide, and potassium chloride used by Oklahoma.

Opponents of lethal injection claim that the individuals who administer the protocol lack the training to safely administer the drugs. The anesthesia level from sodium thiopental at times fails to sufficiently insulate the inmate from pain, inmates may experience suffocation from the pancuronium bromide (which causes death by asphyxiation) and excruciating pain from the potassium chloride (which results in cardiac arrest), and the equipment on some occasions has malfunctioned. Pancuronium bromide also can prevent an inmate from communicating that he or she is suffering pain. There are stories of veins collapsing and needles popping out of an inmate's arm and blocked tubes preventing the administration of the anesthesia. In December 2006, Florida executed Nieves Dias for murder. Diaz remained alive in obvious pain for twenty minutes

You can find Baze v. Reese *on the study site, www.sagepub.com/lippmanccl2e*

following the administration of the first dose, and after thirty-five minutes a second lethal dose was administered. The medical examiner determined that the chemicals accidentally had been injected into soft tissue rather than into the vein. Governor Jeb Bush temporarily suspended executions in the state and appointed a commission to evaluate the humanity and legality of lethal injections. Florida reintroduced lethal injection eighteen months later. In June 2008, an Ohio lower court judge held that the state's three-drug protocol ran the risk of causing unnecessary pain and was unconstitutional in light of the Ohio statute that "death by lethal injection must be caused quickly and painlessly."

The Juvenile Death Penalty

The next case in the book involves the issue of whether the capital punishment of juvenile offenders constitutes cruel and unusual punishment.

In 1966, in *Kent v. United States,* the U.S. Supreme Court limited the broad authority exercised by state and local judges in waiving juveniles over for criminal prosecution as adults.[40] The U.S. Supreme Court was next asked and refused on several occasions during the 1980s to rule on the constitutionality of the juvenile death penalty. In *Eddings v. Oklahoma,* in 1982, the Supreme Court declined to rule on the constitutionality of the death penalty against juveniles, but held that a defendant's youth and psychological and social background must be considered in mitigation of punishment.[41]

In *Thompson v. Oklahoma,* in 1988, the Supreme Court ruled that the execution of a young person who was under the age of sixteen at the time of his or her offense constituted cruel and unusual punishment. Justice John Paul Stevens wrote that "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or pressure than is an adult."[42]

In *Stanford v. Kentucky,* in 1989, the U.S. Supreme Court finally addressed the issue of the application of the death penalty against individuals under the age of eighteen and ruled that there was no national consensus against the execution of individuals sixteen or seventeen years of age and that the imposition of capital punishment could not be considered either cruel or unusual. Justice Scalia relied on the objective fact that of the thirty-seven states that provided for capital punishment, only fifteen declined to impose it on sixteen-year-olds and twelve did not extend the death penalty to seventeen-year-old defendants.[43]

The petitioners in *Stanford* pointed to the fact that of the 2,106 sentences of death handed out between 1982 and 1988, only fifteen were imposed against individuals who were under sixteen at the time of their crimes and only thirty against individuals who were seventeen at the time of the crime. Actual executions for crimes committed by individuals under age eighteen constituted only about two percent of the total number of executions between 1642 and 1986. Justice Scalia explained that the statistics merely indicated that prosecutors and juries shared the view that there was a select but dangerous group of juveniles deserving of death.

In *Roper v. Simmons,* the U.S. Supreme Court once again considered whether the execution of individuals who are sixteen or seventeen years of age constitutes cruel and unusual punishment.

Did sentencing seventeen-year-old Christopher Simmons to death for murder constitute cruel and unusual punishment?

Roper v. Simmons, *543 U.S. 551 (2005),* Opinion by: Kennedy, J.

This case requires us to address . . . whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than fifteen but younger than eighteen when he committed a capital crime.

Facts

At the age of seventeen, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after

he had turned eighteen, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged fifteen and sixteen respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 A.M. on the night of the murder, but Tessmer left before the other two set out. (The state later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September ninth, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face." The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The state charged Simmons with burglary, kidnapping, stealing, and murder in the first degree. As Simmons was seventeen at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. He was tried as an adult. At trial the state introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The state sought the death penalty. As aggravating factors, the state submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. The state called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the state had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty. . . . After these proceedings in Simmons' case had run their course, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person (*Atkins* v. *Virginia,* 536 U.S. 304 (2002)). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed that "a national consensus has developed against the execution of juvenile offenders." . . . On this reasoning it set aside Simmons's death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor."

Issue

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. As the court has explained, the Eighth

Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. . . . We now reconsider the issue . . . whether the death penalty is a disproportionate punishment for juveniles.

Reasoning

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, thirty states prohibited the death penalty for the mentally retarded. This number comprised twelve that had abandoned the death penalty altogether, and eighteen that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, thirty states prohibit the juvenile death penalty, comprising twelve that have rejected the death penalty altogether and eighteen that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Atkins emphasized that even in the twenty states without formal prohibition, the practice of executing the mentally retarded was infrequent. In the present case, too, even in the twenty states without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford,* six states have executed prisoners for crimes committed as juveniles. In the past ten years, only three have done so: Oklahoma, Texas, and Virginia. In December 2003, the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that "we ought not to be executing people who, legally, were children." . . . By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last ten years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford* v. *Kentucky.*

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen states that permitted the execution of the mentally retarded at the time of *Penry v. Lynaugh,* 492 U.S. 302 (1989) [finding no national consensus against execution of mentally challenged individuals] had prohibited the practice by the time we heard *Atkins.* By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five states that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening fifteen years—four through legislative enactments and one through judicial decision.

Though less dramatic than the change from *Penry* to *Atkins* . . . we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins,* with respect to the States that had abandoned the death penalty for the mentally retarded . . . "it is not so much the number of these States that is significant, but the consistency of the direction of change." In particular we found it significant that, in the wake of *Penry,* no state that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry;* yet we think the same consistency of direction of change has been demonstrated. Since *Stanford,* no state that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects. Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past fifteen years, moreover, may have a simple explanation. When we heard *Penry,* only two death penalty states had already prohibited the execution of the mentally retarded. When we heard *Stanford,* by contrast, twelve death penalty states had already prohibited the execution of any juvenile under eighteen, and fifteen had prohibited the execution of any juvenile under seventeen. If anything, this shows that the impropriety of executing juveniles between sixteen and eighteen years of age gained wide recognition earlier than the impropriety of executing the mentally retarded. In the words of the Missouri Supreme Court, "It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred." Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles.

As in *Atkins,* the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where

it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

A majority of States have rejected the imposition of the death penalty on juvenile offenders under eighteen, and we now hold this is required by the Eighth Amendment.

. . . Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

The general differences between juveniles under eighteen and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondents cite tend to confirm, "A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. . . ." In recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ("Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.") This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

. . . Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders." As for retribution, . . . whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles. . . . Here . . . the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. . . . The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. . . . Drawing the line at eighteen years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen. By the same token, some under eighteen have already attained a level of maturity some adults will never reach.

Our determination that the death penalty is disproportionate punishment for offenders under eighteen finds confirmation in the stark reality that the United States

is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the laws of other countries and . . . international authorities are instructive in interpreting the Eighth Amendment's prohibition of "cruel and unusual punishments." Respondent does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. . . .

Holding

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

Dissenting, *O'Connor, J.*

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his eighteenth birthday, no matter how deliberate, wanton, or cruel the offense. . . . The rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any seventeen-year-old offender. I do not subscribe to this judgment. Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some seventeen-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

Questions for Discussion

1. Summarize the data Justice Kennedy reviews in concluding that capital punishment for juveniles is disproportionate punishment.
2. What are the similarities and differences in statistics relating to the execution of the mentally retarded compared to the data concerning juveniles? Is there a clear consensus against capital punishment for individuals under eighteen?
3. Why does Justice Kennedy conclude that juveniles are not among the "worst offenders who merit capital punishment"? What does Justice Kennedy write about the interests in retribution and deterrence in regards to juveniles?
4. Explain why Justice Kennedy refers to other countries. Is this relevant to a decision of the U.S. Supreme Court?
5. The jurors at trial concluded that Simmons deserved the death penalty. Would it be a better approach to permit each state to remain free to determine whether to impose the death penalty for juveniles under eighteen? Is life imprisonment without parole a proportionate penalty for a juvenile convicted of the intentional killing of another person?
6. How would you rule in *Simmons?*

Crime in the News

In 2008 in *Kennedy v. Louisiana*, the U.S. Supreme Court ruled by a vote of five to four that the imposition of the death penalty on a defendant convicted of the rape of a child constituted cruel and unusual punishment. The case almost immediately became embroiled in controversy and is one of the Court's most controversial decisions in recent memory.

On March 2, 1998, Patrick Kennedy called 911 and reported that his stepdaughter, L.H., had been dragged from the garage and raped by two neighborhood boys who fled on their bikes. The police found L.H. in bed wrapped in a bloody blanket bleeding profusely. At the hospital, an expert in pediatric forensic medicine reported that L.H.'s injuries were the most severe that he had witnessed from a sexual assault, and L.H. was rushed into surgery. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. L.H.'s entire perineum was torn from the posterior fourchette to the anus. Both L.H. and Kennedy told investigators that L.H. had been raped by two neighborhood boys, and L.H. repeated this account during a lengthy examination by a psychologist.

Eight days following the rape, Kennedy was arrested and charged with the aggravated rape of a child under twelve. A number of factors led the police to question whether L.H. had been raped by two neighborhood boys. For example, Kennedy had called his employer three hours prior to the time that he allegedly discovered that L.H. had been raped and reported that he would not be at work. He then called a fellow employee to ask how to get blood out of a carpet because his daughter had "just become a lady." An hour later, Kennedy phoned a carpet cleaning service and asked for emergency assistance in removing bloodstains from the carpet, and thirty minutes later he called 911 to report the rape.

In June 1998, twenty-one months following the assault, L.H. revealed that Kennedy had raped her. The jury unanimously convicted Kennedy. At the sentencing stage, a cousin of Kennedy's former wife reported that Kennedy had abused her when she was eight, and the jury sentenced Kennedy to death. The verdict was affirmed by the Louisiana Supreme Court, which noted that other than first-degree murder, there is no other nonhomicide crime more deserving of the death penalty.

Kennedy, an African American, was the first person to receive the death penalty for rape under Louisiana's 1995 death penalty law. He was an eighth-grade dropout with an IQ of 70 whose record was marked by a prior conviction for attempting to cash five worthless checks. In 2007, Richard Davis joined Kennedy on death row when he was sentenced to death for the aggravated rape of a five-year-old. Louisiana stands alone among the states in having sentenced a defendant to death for the rape of a child.

U.S. Supreme Court Justice Anthony Kennedy authored the majority opinion of the Supreme Court in *Kennedy* and asserted that the death penalty for the rape of child is a disproportionate punishment as measured by the evolving standards of contemporary society. Justice Kennedy rested this conclusion on the "objective indicator" of state legislation and practice.

In 1925, eighteen states, the District of Columbia, and the federal government authorized the death penalty for the rape of a child or of an adult. Between 1930 and 1964, 455 people were executed for this offense. The last person executed for the rape of a child was Ronald Wolfe in 1964 in Missouri.

The landscape of the death penalty changed in 1972 with *Furman v. Georgia,* in which the Supreme Court invalidated most state death penalty statutes. Louisiana reintroduced the death penalty for the rape of a child in 1995. Louisiana law at the time of Kennedy's prosecution provided that anal or vaginal intercourse with a child under twelve constitutes aggravated rape and is punishable by death. Five states followed Louisiana's example: Georgia, Montana, Oklahoma, South Carolina, and Texas. Four of these states' statutes are narrower than Louisiana's and limit the death penalty to offenders with a previous rape conviction. Georgia requires a finding of aggravating circumstances such as a prior conviction for a designated offense.

Justice Kennedy pointed out that forty-four states did not authorize the death penalty for child rape and that in 1994 Congress expanded the number of federal crimes punishable by death and yet failed to include child rape or abuse. The forty-four states that did not provide for capital punishment for the rape of a child is greater than the number of jurisdictions that prohibited capital punishment for the mentally challenged (thirty) and juveniles (thirty) at the time that the Supreme Court held that the execution of these types of individuals constituted cruel and unusual punishment. It is roughly the same as the number of states that in 2002 prohibited the execution of an individual who participated in a robbery and who was not responsible for the killing (forty-two) at the time that the Supreme Court held the execution of these individuals to constitute cruel and unusual punishment.

Justice Kennedy also noted that no defendants had been executed for childhood rape in recent years. The death penalty also had been infrequently imposed on juveniles (five executions) and mentally challenged defendants (five executions) despite the fact that twenty states had provided for the imposition of this penalty on these individuals. Six individuals between 1954 and 1983 had been sentenced to death for participation in a robbery.

Justice Kennedy dismissed the argument that in the last thirteen years there had been a movement toward making child rape a capital offense. It was true that six states had adopted statutes providing for the death penalty for the rape of a child since 1995 and that three of these laws had been passed in the last two years. The trend of legislation, however, had been far stronger at the time of the Supreme Court decisions declaring that it was cruel and unusual punishment to execute mentally challenged individuals and juveniles. The six states that declared child rape a capital offense was comparable to the number of states (eight) that imposed the death penalty for involvement in robbery.

Louisiana contended that any analysis of the number of states that provided for the death penalty for the rape of the child should consider the confusion that resulted from the Supreme Court's 1976 decision in *Coker v. Georgia,* in which the U.S. Supreme Court held that the death penalty for rape was disproportionate and excessive under the Eighth Amendment. Justice Kennedy responded that the Court had stressed in *Coker* that the decision was limited to an act of rape against an "adult woman" and found no indication that state legislatures and state courts had misinterpreted *Coker* to stand for the proposition that the death penalty for child rape is unconstitutional. The fact that only five states had adopted statutes providing for capital punishment for child rape in Justice Kennedy's view could not be explained by a misunderstanding of *Coker.*

Justice Kennedy recognized that rape results in a permanent psychological, emotional, and often a physical impact on a child. This, however, does not mean that the imposition of death is proportionate to the offense. The Supreme Court has limited the use of capital punishment

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to crimes in which there has been an intentional taking of a victim's life. Other offenses may be "devastating in their harm," but they cannot be compared to first degree murder in their "severity and irrevocability." Justice Kennedy argued that the imposition of capital punishment for the rape of a child would result in a significant extension of the use of the death penalty that is contrary to "evolving standards of decency."

Number of executions. In 2005, there were 5,702 incidents of vaginal, anal, or oral rape of a child under twelve. This is almost twice the number of intentional murders committed during the same period. Only roughly 2.2 percent of these murderers are sentenced to death. The authorization of the death penalty for the rape of a child would significantly expand the application of the death penalty.

Standards. The Supreme Court had developed a set of aggravating and mitigating factors that a jury may weigh and balance in deciding whether a defendant deserves the death penalty. This imprecise process is acceptable where the victim dies but should not be expanded to other types of offenses.

Justice Kennedy questioned whether a death penalty prosecution will comfort the child victim who is required to testify at trial and to relive his or her brutalization. The unreliability of childhood testimony also may result in false convictions and call into question whether capital punishment is advancing the goals of retribution and incapacitation of dangerous child molesters.

The extension of the death penalty for the rape of a child may undermine the goal of bringing offenders to justice. Children in most cases know their abusers, and their families tend to circle the wagons and in many instances do not report the abuse to the police. Relatives may prove even more reluctant to report molestation when the penalty is death. Perpetrators confronting death for the rape of a child also will have an incentive to murder their victims and to eliminate what is often the sole witness to the crime.

Justice Samuel Alito wrote the dissenting opinion, in which he was joined by Chief Justice Roberts and by Justices Scalia and Thomas. Justice Alito criticized the broad and sweeping nature of the majority opinion, which prohibited the death sentence no matter the age of the child, the frequency and viciousness of the molestation, the number of children raped, or the length of the perpetrator's criminal record. Justice Alito asked, "Is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist?" He answered his own question by asserting that "in the eyes of ordinarily Americans, the very worst child rapists . . . are the epitome of moral depravity."

Justice Alito pointed out that despite the fact that many state legislators and judges mistakenly viewed *Coker* as holding that the death penalty may not be imposed for the rape of a child, six states had adopted laws providing for capital punishment for the death of a child. A number of state legislatures currently were considering imposing the death penalty for the rape of a child, and the majority decision in *Kennedy* put the brakes on what may have proven to be a movement toward the expansion of capital punishment. The Court majority failed to provide a convincing reason why the judgment of these democratically elected legislatures should be short-circuited.

Shortly after the Supreme Court decision in *Kennedy,* it was discovered that in 2006, the lawyers in their briefs submitted to the Court had failed to inform the Supreme Court that the U.S. Congress in the National Defense Authorization Act had provided that the rape of a child when committed by a member of the military was punishable by death. Critics contended that this called into question the notion that there was no national consensus for imposing the death penalty for the rape of the child. The Court responded by taking the unusual step of announcing that it would evaluate whether to reconsider the judgment in *Kennedy.* In October 2008, the majority decided that the authorization of the death penalty in the "military sphere does not indicate that the penalty is constitutional in the civilian context" and does not "affect our reasoning or conclusions." Justice Antonin Scalia thundered in response that "the indifferent response of the majority of the Court reveals that they are imposing their own political preference rather than following a national consensus" (*Kennedy v. Louisiana,* 554 U.S. __ (2008)).

Louisiana Governor Bobby Jindal nonetheless proclaimed that he was "outraged" by the Supreme Court decision in *Kennedy* and condemned the judgment as "incredibly absurd" and as a "clear abuse of judicial authority." Governor Jindal characterized the rape of a child as a "repugnant crime" that deserves the death penalty and observed that the majority of the Supreme Court clearly did not share the "same standards of decency as the people of Louisiana." He vowed that Louisiana officials would find ways to maintain the death penalty for the rape of a child. Alabama Attorney General Troy King condemned the decision as creating a "situation where the country is a less safe place to grow up," and Texas Republican Lieutenant Governor David Dewhurst announced that Texas would not follow a decision that placed at risk "our most precious resource—our children."

The prominent liberal legal scholar Laurence Tribe, of Harvard Law School, joined the chorus of conservative criticism and argued in the *Wall Street Journal* that people concerned about the rule of law must "cry foul" when the Supreme Court interferes with the judgment of an elected state legislature and holds that "torturers or violent rapists of young children . . . [are] constitutionally exempt from the death penalty." He noted that by restricting the death penalty to murder, the Court, in essence, had denied equal protection of the law to children victimized by rape.

The Court majority clearly was concerned that upholding the death penalty for individuals who raped a child

would open the floodgates to the expansion of capital punishment to encompass a variety of reprehensible offenses. What would be next, the death penalty for individuals who severely abused or maimed a child? There was no indication that individuals tempted to rape and molest children were not already deterred by the prospect of a lengthy prison term and by the requirement that they register as sex offender when released from prison.

The U.S. already was subject to international criticism for reliance on capital punishment, and by approving of the death penalty for the rape of a child, the United States would be joining the ranks of fundamentalist Islamic regimes like Saudi Arabia. Louisiana's system of capital punishment already had come under criticism as unreliable and discriminatory. A Columbia University study found that roughly half of death penalty convictions in Louisiana had been overturned on appeal due to errors and misconduct at trial. Roughly one-third of Louisiana's residents are African American, and yet, seventy percent of the individuals on its death row are African American, and roughly one-half of the individuals who have been executed in Louisiana in the past twenty-six years are African Americans. Confidence in Louisiana's system of capital punishment was further shaken by the fact that nine individuals sentenced to death in recent years had been determined to have been falsely convicted and were released from prison.

Was the U.S. Supreme Court in *Kennedy* justified in holding that the rape of a child under all circumstances is cruel and unusual punishment under the Eighth Amendment? Should the Court have allowed the states to determine for themselves whether to impose the death penalty for the rape of a child or, in the alternative, should the Court have articulated various aggravating circumstances that would justify the death penalty for the rape of a child?

You can find Kennedy v. Louisiana *on the study site, www.sagepub.com/lippmanccl2e*

The Amount of Punishment: Sentences for a Term of Years

The U.S. Supreme Court has remained sharply divided over whether the federal judicial branch is constitutionally entitled to extend its proportionality analysis beyond the death penalty to imprisonment for a "term of years." The Court appears to have accepted that the length of a criminal sentence is the province of elected state legislators and that judicial intervention should be "extremely rare" and limited to sentences that are "grossly disproportionate" to the seriousness of the offense. Excessively severe sentences are not considered to advance any of the accepted goals of criminal punishment and constitute the purposeless and needless imposition of pain and suffering.

The implications of this approach were illustrated by Justice Sandra Day O'Connor's opinion in *Lockyer v. Andrade,* in 2003, in which the Supreme Court affirmed two consecutive twenty-five-year-to-life sentences for a defendant who on two occasions in 1995 stole videotapes with an aggregate value of roughly $150 from two stores.[44] These two convictions, when combined with Andrade's arrest thirteen years earlier for three counts of residential burglary, triggered two separate mandatory sentences under California's **Three Strikes and You're Out law.** This statute provides a mandatory sentence for individuals who commit a third felony after being previously convicted for two serious or violent felonies. Stringent penalties also are provided for a second felony. Justice O'Connor held that the "gross disproportionality principle reserves a constitutional violation for only the extraordinary case" and that the sentence in *Andrade* was not "an unreasonable application of our clearly established law."[45]

In *Ewing v. California,* decided on the same day as *Lockyer,* Justice O'Connor affirmed a twenty-five-year sentence for Daniel Ewing under California's Three Strikes and You're Out law. Ewing was adjudged guilty of the grand theft of nearly $1,200 worth of merchandise and had previously been convicted of several violent or serious felonies. Justice Sandra Day O'Connor ruled that the Supreme Court was required to respect California's determination that it possessed a public-safety interest in incapacitating and deterring recidivist felons like Ewing, whose previous offenses included robbery and three residential burglaries.[46]

Weems v. United States is an example of the rare case in which the Supreme Court has ruled that a punishment is grossly disproportionate to the crime and is unconstitutional. Weems was convicted under the local criminal law in the Philippines of forging a public document. He was sentenced to twelve years at hard labor as well as to manacling at the wrist and ankle. During Weems's twelve-year imprisonment, he was deprived of all legal rights and upon his release lost all political rights (such as the right to vote) and was monitored by the court. The U.S. Supreme Court ruled that Weems's sentence was "cruel in its excess of imprisonment and that which accompanies

and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."[47]

The next case, *Hunter v. Wilson,* asks you to consider whether the defendant's mandatory minimum sentence of ten years in prison under Georgia's aggravated child molestation law constitutes cruel and unusual punishment. In *Rummel v. Estelle,* Justice Louis Powell observed that a "mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice."[48] Consider Justice Powell's statement in evaluating whether Wilson's sentence is grossly disproportionate.

Did Wilson's sentence of ten years in prison for consensual oral sex constitute cruel and unusual punishment?

Humphrey v. Wilson, *652 S.E.2D 501 (GA. 2007),* Opinion by: Sears, J.

Facts

In February 2005, Wilson was found guilty in Douglas County for the aggravated child molestation of T. C. Wilson was seventeen years old at the time of the crime, and the victim was fifteen years old. The sexual act involved the victim willingly performing oral sex on Wilson. At the time of Wilson's trial, the minimum sentence for a conviction of aggravated child molestation was ten years in prison with no possibility of probation or parole; the maximum sentence was thirty years in prison. The trial court sentenced Wilson to eleven years, ten to serve and one year on probation. In addition to the foregoing punishment, Wilson was also subject to registration as a sex offender. In this regard . . . Wilson would be required, before his release from prison, to provide prison officials with, among other things, his new address, his fingerprints, his social security number, his date of birth, and his photograph. Prison officials would have to forward this information to the sheriff of Wilson's intended county of residence, and Wilson, within 72 hours of his release, would have to register with that sheriff, and he would be required to update the information each year for the rest of his life. Moreover, upon Wilson's release from prison, information regarding Wilson's residence, his photograph, and his offense would be posted in numerous public places in the county in which he lived and on the internet. Significantly, Wilson could not live or work within 1,000 feet of any child care facility, church, or area where minors congregate.

After the trial court denied Wilson's motion for new trial, Wilson filed a notice of appeal to this court. This court transferred the appeal to the court of appeals, and that court affirmed Wilson's conviction on April 28, 2006. On appeal . . . Wilson contended that his sentence constituted cruel and unusual punishment. The court of appeals did not address Wilson's contention that his sentence constituted cruel and unusual punishment and rejected the appeal on other grounds. In a motion for reconsideration filed on May 8, 2006, Wilson stated that, two days before the court of appeals issued its opinion, Georgia Governor Sonny Perdue signed House Bill 1059, which amended Official Code of Georgia (OCGA) section 16–6-4 effective July 1, 2006, by adding a new subsection (d)(2) to make conduct such as Wilson's a misdemeanor and which amended OCGA 42–1-12 to relieve him from having to register as a sex offender. . . . The court of appeals denied Wilson's motion for reconsideration. Wilson thereafter petitioned this court for consideration. This court subsequently denied Wilson's petition for certiorari.

On April 16, 2007, Wilson filed the present application for writ of habeas corpus, contending that his sentence constituted cruel and unusual punishment due in large part to the fact that the 2006 amendment to OCGA section 16–6-4 makes conduct such as his a misdemeanor, while the 2006 amendment to OCGA section 42–1-12 relieved him from the requirements of the sex offender registry. In this regard, the 2006 amendment to OCGA section 16–6-4 provides that, if a person engages in sodomy with a victim who "is at least 13 but less than 16 years of age" and, if the person who engages in the conduct is "18 years of age or younger and is no more than four years older than the victim," the person is guilty of the new crime of misdemeanor aggravated child molestation. Moreover, the 2006 amendment to OCGA section 42–1-12 provided that teenagers whose conduct is a misdemeanor under the 2006 amendment to OCGA section 16–6-4 do not have to register as sex offenders.

Concluding that the extraordinary changes in the law reflected in the 2006 amendments to OCGA sections 16–6-4 and 42–1-12 reflected this state's contemporary view of how Wilson's conduct should be punished, the habeas court ruled that Wilson's punishment was cruel and unusual. Finally, the habeas court, as a remedy, ruled that Wilson was guilty of misdemeanor aggravated child molestation under the 2006 amendment to OCGA section 16–6-4, and it sentenced Wilson to twelve months to serve with credit for time served. On June 11, 2007, the warden filed a notice of appeal from the habeas court's grant of relief to Wilson.

Issue

The prison warden . . . contends that the habeas court erred in ruling that Wilson's sentence constituted cruel and unusual punishment.

Reasoning

Under the Eighth Amendment to the United States Constitution and under article 1, section 1, paragraph 17 of the Georgia Constitution, a sentence is cruel and unusual if it "is grossly out of proportion to the severity of the crime." Moreover, whether "a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of a maturing society.'" Legislative enactments are the clearest and best evidence of a society's evolving standard of decency and of how contemporary society views a particular punishment.

In determining whether a sentence set by the legislature is cruel and unusual, this court has cited with approval Justice Kennedy's concurrence in *Harmelin v. Michigan.* Under Justice Kennedy's concurrence in *Harmelin,* as further developed in *Ewing v. California,* in order to determine if a sentence is grossly disproportionate, a court must first examine the "gravity of the offense compared to the harshness of the penalty" and determine whether a threshold inference of gross disproportionality is raised. In making this determination, courts must bear in mind the primacy of the legislature in setting punishment and seek to determine whether the sentence furthers a "legitimate penological goal" considering the offense and the offender in question. If a sentence does not further a legitimate penological goal, it is not a rational legislative judgment that is entitled to deference and a threshold showing of disproportionality has been made.

If this threshold analysis reveals an inference of gross disproportionality, a court must proceed to the second step and determine whether the initial judgment of disproportionality is confirmed by a comparison of the defendant's sentence to sentences imposed for other crimes within the jurisdiction and for the same crime in other jurisdictions.

Before undertaking the foregoing analysis, we address the warden's contention that this court's recent decision in *Widner v. State* controls the cruel and unusual punishment issue adversely to Wilson. We conclude that *Widner* is not controlling. Widner was eighteen years old when he had oral sex with a willing fourteen-year-old girl, and he received a ten-year sentence under OCGA section 16–6-4. On appeal, we resolved Widner's claim of cruel and unusual punishment against him. However, the basis of Wilson's claim in the present case—the 2006 amendment to OCGA section 16–6-4—did not become effective until after Widner's appeal, and Widner thus did not predicate his cruel and unusual punishment contention on the 2006 amendment for that reason.

There is, however, a more significant reason *Widner* is not controlling in the present case. The 2006 amendment to OCGA section 16–6-4 did not alter the punishment for Widner's conduct. In *Widner,* the minor child turned fourteen five days before the incident in question. Widner was eighteen and a half years old at that time. Widner was thus more than four years older than the victim. The 2006 amendment to OCGA section 16–6-4 changed the punishment for oral sex with a thirteen-, fourteen-, or fifteen-year-old child when the defendant is "no more than four years older than the victim." Accordingly, the amendment does not apply to Widner's conduct and does not raise an inference of gross disproportionality with respect to his sentence.

We turn now to the threshold inquiry of disproportionality as developed in *Harmelin* and *Ewing*. In this regard, we conclude that the rationale of our decisions in *Fleming* . . . leads to the conclusion that, considering the nature of Wilson's offense, his ten-year sentence does not further a legitimate penological goal and thus the threshold inquiry of gross disproportionality falls in Wilson's favor.

Here, the legislature has recently amended OCGA section 16–6-4 to substitute misdemeanor punishment for Wilson's conduct in place of the felony punishment of a minimum of ten years in prison (with the maximum being 30 years in prison) with no possibility of probation or parole. Moreover, the legislature has relieved such teenage offenders from registering as a sex offender. It is beyond dispute that these changes represent a seismic shift in the legislature's view of the gravity of oral sex between two willing teenage participants. Acknowledging, as we must . . . that no one has a better sense of the evolving standards of decency in this state than our elected representatives, we conclude that the amendments to OCGA sections 16–6-4 and 42–1-12 reflect a decision by the people of this state that the severe felony punishment and sex offender registration imposed on Wilson make no measurable contribution to acceptable goals of punishment.

Stated in the language of *Ewing* and *Harmelin,* our legislature compared the gravity of the offense of teenagers who engage in oral sex but are within four years of age of each other and determined that a minimum ten-year sentence is grossly disproportionate for that crime. This conclusion appears to be a recognition by our General Assembly that teenagers are engaging in oral sex in large numbers; that teenagers should not be classified among the worst offenders because they do not have the maturity to appreciate the consequences of irresponsible sexual conduct and are readily subject to peer pressure; and that teenage sexual conduct does not usually involve violence and represents a significantly more benign situation than that of adults preying on children for sex. Similarly, the Model Penal Code adopted a provision in 1980 decriminalizing oral or vaginal sex with a person under sixteen years old where that person willingly engaged in the acts with another person who is not more than four years older. The commentary to the Model Penal Code explains that the criminal law should not target "sexual

experimentation among social contemporaries"; that "it will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct . . . will be an experienced exploiter of immaturity"; and that the "more likely case is that both parties will be willing participants and that the assignment of culpability only to one will be perceived as unfair."

In addition to the extraordinary reduction in punishment for teenage oral sex reflected in the 2006 amendment to OCGA section 16–6-4, the 2006 amendment to that statute also provided for a large increase in the punishment for adults who engage in child molestation and aggravated child molestation. The new punishment for adults who engage in child molestation is ten years to life in prison, whereas the punishment under the prior law was imprisonment "for not less than five nor more than twenty years." For aggravated child molestation, the punishment for adults is now twenty-five years to life, followed by life on probation, with no possibility of probation or parole for the minimum prison time of twenty-five years. The significant increase in punishment for adult offenders highlights the legislature's view that a teenager engaging in oral sex with a willing teenage partner is far from the worst offender and is, in fact, not deserving of similar punishment to an adult offender.

Although society has a significant interest in protecting children from premature sexual activity, we must acknowledge that Wilson's crime does not rise to the level of culpability of adults who prey on children and that, for the law to punish Wilson as it would an adult, with the extraordinarily harsh punishment of ten years in prison without the possibility of probation or parole, appears to be grossly disproportionate to his crime.

Based on the foregoing factors and, in particular, based on the significance of the sea change in the General Assembly's view of the appropriate punishment for teenage oral sex, we could comfortably conclude that Wilson's punishment, as a matter of law, is grossly disproportionate to his crime without undertaking the further comparisons outlined in *Harmelin* and *Ewing*. However, we nevertheless will undertake those comparisons to complete our analysis.

A comparison of Wilson's sentence with sentences for other crimes in this state buttresses the threshold inference of gross disproportionality. For example, a defendant who gets in a heated argument and shoving match with someone, walks away to retrieve a weapon, returns minutes later with a gun, and intentionally shoots and kills the person may be convicted of voluntary manslaughter and sentenced to as little as one year in prison. A person who plays Russian Roulette with a loaded handgun and causes the death of another person by shooting him or her with the loaded weapon may be convicted of involuntary manslaughter and receive a sentence of as little as one year in prison and no more than ten years. A person who intentionally shoots someone with the intent to kill, but fails in his aim such that the victim survives, may be convicted of aggravated assault and receive as little as one year in prison. A person who maliciously burns a neighbor's child in hot water, causing the child to lose use of a member of his or her body, may be convicted of aggravated battery and receive a sentence of as little as one year in prison. Finally, at the time Wilson committed his offense, a fifty-year-old man who fondled a five-year-old girl for his sexual gratification could receive as little as five years in prison, and a person who beat, choked, and forcibly raped a woman against her will could be sentenced to ten years in prison. There can be no legitimate dispute that the foregoing crimes are far more serious and disruptive of the social order than a teenager receiving oral sex from another willing teenager. The fact that these more culpable offenders may receive a significantly smaller or similar sentence buttresses our initial judgment that Wilson's sentence is grossly disproportionate to his crime.

Finally, we compare Wilson's sentence to sentences imposed in other states for the same conduct. A review of other jurisdictions reveals that most states either would not punish Wilson's conduct or would, like Georgia now, punish it as a misdemeanor. Although some states retain a felony designation for Wilson's conduct, we have found no state that imposes a minimum punishment of ten years in prison with no possibility of probation or parole, such as that provided for by former section 16–6-4. This review thus also reinforces our initial judgment of gross disproportionality between Wilson's crime and his sentence.

At this point, the Supreme Court's decision in *Weems v. United States* merits discussion. In that case, Weems forged signatures on several public documents. The Supreme Court found that a minimum sentence of twelve years in chains at hard labor for falsifying public documents, combined with lifetime surveillance by appropriate authorities after Weems's release from prison, constituted cruel and unusual punishment. The Court stated that, because the minimum punishment imposed on Weems was more severe than or similar to punishments for some "degrees of homicide" and other more serious crimes, Weems's punishment was cruel and unusual. According to the Court, this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice.

Holding

All of the foregoing considerations compel the conclusion that Wilson's sentence is grossly disproportionate to his crime and constitutes cruel and unusual punishment under both the Georgia and United States Constitutions. We emphasize that it is the "rare case in which the inference of gross disproportionality will be met" and a rarer case still in which that threshold inference stands after further scrutiny. The present case, however, is one of those rare cases. We also emphasize that nothing in this opinion should be read as endorsing attempts by

the judiciary to apply statutes retroactively. We are not applying the 2006 amendment retroactively in this case. Instead . . . we merely factor the 2006 amendment into the evaluation of whether Wilson's punishment is cruel and unusual.

Today's opinion will affect only a small number of individuals whose crimes and circumstances are similar to Wilson's, i.e., those teenagers convicted only of aggravated child molestation, based solely on an act of sodomy, with no injury to the victim, involving a willing teenage partner no more than four years younger than the defendant. Wilson stands convicted of aggravated child molestation, and . . . we have determined that, under the statute then in effect, the minimum punishment authorized by the legislature for that crime is unconstitutional. . . .

Dissenting, *Carley, J.*

Because I believe that the majority's conclusion that Wilson's felony sentence constitutes cruel and unusual punishment does violence to the fundamental constitutional principle of separation of powers and is contrary to the doctrine of *stare decisis,* I respectfully dissent. . . .

It is important to note at the outset that the factual basis for Wilson's prosecution is not an act which is in any sense protected by the constitutional right of privacy. The evidence shows that a group of teenagers rented adjacent rooms at a motel and held a raucous, unsupervised New Year's Eve party. Among the participants were seventeen-year-old Genarlow Wilson, seventeen-year-old L. M., and fifteen-year-old T. C. The next morning, L. M. reported to her mother that she had been raped. Police were notified, and the motel rooms were searched. During the search, a video camera and videocassette tape were found. The tape showed Wilson having sexual intercourse with an apparently semiconscious L. M., and T. C. performing oral sex on Wilson. As a result, Wilson was charged with the rape of L. M. and with the aggravated child molestation of T. C. Acquitted of the former offense and convicted of the latter, he was given a mandatory sentence of ten years imprisonment without possibility of parole. When Wilson engaged in the very public act of oral sodomy with a fifteen-year-old child, he committed the crime of aggravated child molestation and, as a result, he received the felony sentence mandated for that offense (former OCGA section 16–6-4 (d)(1)).

Subsequently, the General Assembly did amend the statute so as to provide that the crime of aggravated child molestation committed under the factual circumstances which underlay Wilson's prosecution would only be punishable as a misdemeanor (OCGA section 16–6-4 (d)(2)). However, the effective date of that change in the law was July 1, 2006, which is more than a year-and-a-half after Wilson committed the offense for which he was convicted. In amending the law to provide for misdemeanor punishment, the General Assembly not only provided generally that the change would become effective on July 1, 2006. It also specifically addressed the issue of retroactive application. The effect of this clear and unambiguous provision is to preclude giving retroactive effect to the 2006 amendment so as to "affect or abate" the status of Wilson's crime as felony aggravated child molestation punishable in accordance with the sentence authorized at the time he committed that offense. The majority fails to acknowledge this provision of the statute, presumably because to do so would completely destroy the foundation upon which it bases its ultimate conclusion that Wilson's felony sentence constitutes cruel and unusual punishment.

In connection with a claim of cruel and unusual punishment, the enactments of the General Assembly are the clearest and best evidence of a society's evolving standards of decency and of how contemporary society views a particular punishment. The majority acknowledges this tenet and purports to invoke it. However, a faithful adherence to that principle would seem to require a consideration of the totality of the law in question, which in this case certainly includes every provision of the 2006 statute. Accordingly, while I am very sympathetic to Wilson's argument regarding the injustice of sentencing this promising young man, with good grades and no criminal history, to ten years in prison without parole and a lifetime registration as a sexual offender because he engaged in consensual oral sex with a fifteen-year-old victim only two years his junior, this court is bound by the Legislature's determination that young persons in Wilson's situation are not entitled to the misdemeanor treatment now accorded to identical behavior under OCGA section 16–6-4 (d)(2).

The majority does not demonstrate that an unqualified felony sentence for aggravated child molestation constituted cruel and unusual punishment at the time that Wilson committed that crime. Indeed, it cannot so demonstrate, since the law which was then in effect "provide[d] no such exception [to mandatory felony sentencing based upon the age of the defendant and victim], and, because the required punishment does not unconstitutionally shock the conscience, [such a] sentence must stand." Wilson's sentence does not become cruel and unusual simply because the General Assembly made the express decision that he cannot benefit from the subsequent legislative determination to reduce the sentence for commission of that crime from felony to misdemeanor status. To the contrary, it is because the General Assembly made that express determination that his felony sentence cannot be deemed cruel and unusual. It is for the legislature to "determine to what extent certain criminal conduct has demonstrated more serious criminal interest and damaged society and to what extent it should be punished."

In actuality . . . today's decision is rare because of its unprecedented disregard for the General Assembly's constitutional authority to make express provision against the giving of any retroactive effect to its legislative lessening of the punishment for criminal offenses. If . . . the judiciary is permitted to determine that a formerly authorized harsher sentence nevertheless constitutes cruel and unusual

punishment, then it necessarily follows that there are no circumstances in which the General Assembly can insulate its subsequent reduction of a criminal sentence from possible retroactive application by courts. Wilson is certainly not the only defendant convicted of aggravated child molestation who benefits at the expense of today's judicial reduction of the General Assembly's power to legislate. At present, any and all defendants who were ever convicted of aggravated child molestation and sentenced for a felony under circumstances similar to Wilson are, as a matter of law, entitled to be completely discharged from lawful custody even though the General Assembly expressly provided that their status as convicted felons would not be affected by the very statute upon which the majority relies to free them. . . . Moreover, nothing in today's decision limits its application to cases involving minors who engage in voluntary sexual acts. Any defendant who was ever convicted in this state for the commission of any crime for which the sentence was subsequently reduced is now entitled to claim that his harsher sentence, though authorized under the statute in effect at the time it was imposed, has since become cruel and unusual and that, as a consequence, he is not only entitled to the benefit of the more lenient sentence, but should be released entirely from incarceration. . . . Accordingly, as a result of this "rare case," the superior courts should be prepared for a flood of habeas corpus petitions filed by prisoners who seek to be freed from imprisonment because of a subsequent reduction in the applicable sentences for the crimes for which they were convicted.

The courts of this state must give due regard to the authority of the legislative branch of government. The constitutional principle of separation of powers is intended to protect the citizens of this state from the tyranny of the judiciary, insuring that the authority to enact the laws will be exercised only by those representatives duly elected to serve as legislators. The General Assembly "being the sovereign power in the State, while acting within the pale of its constitutional competency, it is the province of the courts to interpret its mandates, and their duty to obey them, however absurd and unreasonable they may appear."

Questions for Discussion

1. What was Wilson's original prison sentence? How was the law changed following his conviction?
2. Why did the Georgia Supreme Court rule that Wilson had been subjected to cruel and unusual punishment?
3. Explain how, following Wilson's conviction, Georgia courts could hold that Wilson had not been subjected to cruel and unusual punishment, and then two years later reverse themselves and hold that Wilson's punishment constituted cruel and unusual punishment.
4. Had the Georgia legislature not modified the punishment for aggravated child molestation, would the Georgia Supreme Court have ruled that Wilson's sentence constituted cruel and unusual punishment?
5. Does it make sense that because Widner was more than four years older than his sexual partner that his punishment was not considered to be cruel and unusual?
6. Summarize the main points made in the dissenting opinion.
7. How would you rule in *Wilson?*

You Decide

3.1 The defendant Jerry Hayes, age thirty-four, was convicted in 1998 of the "serious" theft of property valued at over $500 from the cash register where he worked. Following his arrest, Hayes returned sixty-nine percent of the $1,000 that he stole. The trial court found that Hayes was a three-time felon and habitual offender, and he was sentenced to life in prison at hard labor without the benefit of parole, probation, or the suspension of his sentence. Hayes had previously been convicted of two thefts under $100, one over $100, several counts of issuing worthless checks, check forgery, and simple robbery in addition to the instant offense of theft of over $500.

The simple robbery (a violent felony) required to qualify Hayes for life imprisonment, in combination with two other felonies, took place in 1991 when Hayes pushed a juvenile and stole his bicycle. None of his crimes involved a dangerous weapon. Hayes's probation officer recommended a sentence of ten years to the prosecutor, and his employer favored imprisonment as a step toward rehabilitation. The Louisiana appellate court held that despite the provision for a mandatory sentence, a court may depart from the required presumptive minimum sentence if the defendant is able to establish that there is clear and convincing evidence in the particular case that the sentence is excessive in that the "defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the guilt of the offender, the gravity of the offense, and the circumstances." The Louisiana appellate court ruled that a life sentence was disproportionate. Hayes undoubtedly is a "tenacious thief," but a sentence of between twenty and forty years would have met the "societal goals of incarceration."

The Louisiana Habitual Offender Law is intended to punish an individual for "the instant crime in light of the . . . individual's continuing disregard of the law." Was life imprisonment "disproportionate to the harm done" and a shock to "one's sense of justice"? See *State v. Hayes,* 739 So. 2d 301 (La. App. 1999).

You can find the answer at www.sagepub.com/lippmanccl2e

See more cases on the study site: People v. Meyer, *www.sagepub.com/lippmanccl2e*

The Amount of Punishment: Drug Offenses

Three Strikes and You're Out legislation is an example of determinate sentencing. Determinate sentences possess the advantage of ensuring predictable, definite, and uniform sentences. On the other hand, this "one size fits all" approach may prevent judges from handing out sentences that reflect the circumstances of each individual case.

A particularly controversial area of determinate sentencing is mandatory minimum sentences for drug offenses. In 1975, New York Governor Nelson Rockefeller initiated the controversial "Rockefeller drug laws" that required that an individual convicted of selling two ounces or possessing eight ounces of a narcotic substance receive a sentence of between eight and twenty years, regardless of the individual's criminal history. This approach in which a judge must sentence a defendant to a minimum sentence was followed by other states. The federal government joined this trend and introduced mandatory minimums in the Anti-Drug Abuse Act of 1986 and the 1988 amendments. The most debated aspect of federal law is the punishment of an individual based on the type and amount of drugs in his or her possession, regardless of the individual's criminal history.

The following quantities are punishable by five years in prison under federal law:

- 100 grams of heroin
- 500 grams of powder cocaine
- 5 grams of crack cocaine
- 100 kilograms of marijuana

The following quantities are punishable by ten years in prison under federal law:

- 1 kilogram of heroin
- 5 kilograms of powder cocaine
- 50 grams of crack cocaine
- 1,000 kilograms of marijuana

Congress softened the impact of the mandatory minimum drug sentences by providing that a judge may issue a lesser sentence in those instances in which prosecutors certify that a defendant has provided "substantial assistance" in convicting other drug offenders. There also is a "safety valve" that permits a reduced sentence for defendants determined by the judge to be low-level, nonviolent, first-time offenders.

Prosecutors argue that the mandatory minimum sentences are required to deter individuals from entering into the lucrative drug trade. The threat of a lengthy sentence is also necessary in order to gain the cooperation of defendants. Prosecutors also point out that individuals who are convicted and sentenced are fully aware of the consequences of their criminal actions.

These laws, nevertheless, have come under attack by both conservative and liberal politicians and by the American Bar Association, a justice of the U.S. Supreme Court, and by the Judicial Conference, which is the organization of federal judges. An estimated twenty-two states have recently modified or are considering amending their mandatory minimum narcotics laws, including Connecticut, Louisiana, Michigan, North Dakota, and Pennsylvania. New York also has modified its Rockefeller drug laws. This trend is encouraged by studies that indicate that these laws have several flaws:

- *Inflexibility.* They fail to take into account the differences between defendants.
- *Disparities in Enforcement.* Drug kingpins are able to trade information for reduced sentences, and some prosecutors who object to harsh drug laws charge defendants with the possession of a lesser quantity of drugs to avoid the mandatory sentencing provisions.
- *Increasing Prison Population.* These laws are thought to be responsible for the growth of the state and federal prison population.
- *Disproportionate Affect on Minorities and Women.* A significant percentage of individuals sentenced under these laws are African Americans or Hispanics involved in street-level drug activity. The increase in the number of women who are incarcerated is attributed to the fact that women find themselves arrested for assisting their husbands or lovers who are involved in the drug trade.

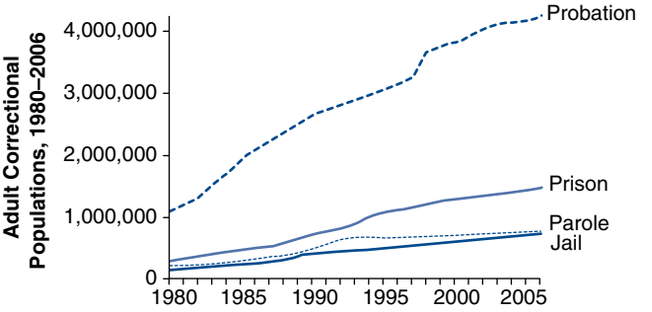
Mandatory minimum state drug laws have been held to be constitutional by the U.S. Supreme Court. In *Hutto v. Davis,* the Supreme Court ruled that Hutto's forty-year prison sentence and $20,000 fine was not disproportionate to his conviction on two counts of possession with intent to distribute and on distribution of a total of nine ounces of marijuana with a street value of

roughly $200. The Court held that the determination of the proper sentence for this offense was a matter that was appropriately determined by the Virginia legislature.[49]

The Tenth Circuit Court of Appeals upheld the fifty-five year sentence given to rap music producer Weldon Angelos. The twenty-six-year-old Angelos, who did not possess an adult criminal history, was convicted of three counts of dealing twenty-four ounces of marijuana while in possession of a firearm. The federal statute provides that a first offense carries a mandatory minimum five-year sentence, and each subsequent conviction carries a mandatory minimum of twenty-five years. Twenty-nine former federal judges and U.S. attorneys protested that Angelos's punishment violated the Eighth Amendment, pointing out that his sentence was longer than he likely would have received for various forms of murder or rape. The three-judge panel disregarded this argument and held that Angelos's punishment for possession of firearms was justified on the grounds that the weapon facilitated his drug activity by providing protection from purchasers and that Angelos's possession of a firearm endangered his neighbors. The Tenth Circuit reasoned that the federal statute furthered these interests and that Angelos's sentence was not grossly disproportionate.[50]

What do you think about the argument that such sentences are so disproportionate and impose such hardship that jurors should refuse to convict defendants charged with quantities of narcotics carrying mandatory minimum sentences?[51]

Figure 3.1 Crime on the Streets: Incarceration Rates. The number of adults in the correctional population has been increasing.



In 2004, there were an estimated 644,700 state prisoners serving time for violent offenses, 265,600 property offenders incarcerated, 249,400 drug offenders in penal custody, and 88,900 individuals imprisoned for public order offenses (e.g., vice, motor vehicle, and weapons offenses).

In 2005, over 7 million people were under some form of correctional supervision, including probation, parole, jail, and prison.

In 2005, the number of inmates incarcerated under state and federal jurisdiction per 100,000 population was 491. In 2006, the figure was 501.

In 2005, the number of persons incarcerated under a sentence of death was 3,245. In 2006, the figure was 3,228.

In 2005, 60 individuals were executed; in 2006, 53; and in 2007, 41.

Source: Bureau of Justice Statistics Correctional Surveys, U.S. Department of Justice.

Criminal Punishment and Status Offenses

In *Robinson v. California,* the U.S. Supreme Court overturned Robinson's conviction under a California law that declared it was a criminal offense "to be addicted to the use of narcotics." The Supreme Court ruled that it was cruel and unusual punishment to impose criminal penalties on Robinson based on his conviction of the **status offense** of narcotics addiction, which a majority of the judges considered an addictive illness. Justice Potter Stewart noted that "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold. . . . It is unlikely that any state would . . . make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with venereal disease. . . . [Such a] law . . . would . . . be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth amendments."[52]

Cruel and Unusual Punishment: A Summary

The prohibition on cruel and unusual punishment in the Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. This prohibition has three components:

- *How.* Punishment may not be inflicted in a cruel or unusual fashion.
- *What.* Capital punishment must be imposed in a proportionate fashion and is reserved for acts of aggravated murder. Courts defer to the legislative branch and accept that sentences for a "term of years" are proportionate. A finding that a sentence for a term of years is disproportionate should be "extremely rare."
- *Who.* Punishment may not be extended to individuals based on a conviction for a status offense; a socially harmful act is required.

Equal Protection

Judicial decisions have consistently held that it is unconstitutional for a judge to base a sentence on a defendant's race, gender, ethnicity, or nationality. In other words, a sentence should be based on a defendant's act rather than on a defendant's identity. A federal district court judge's sentence of thirty years in prison and lifetime supervision for two first-time offenders convicted of a weapons offense and two narcotics offenses was rejected by the federal Second Circuit Court of Appeals based on the trial court judge's observation that the South American defendants "should have stayed where they were. . . . Nobody tells them to come and get involved in cocaine. . . . My father came over with $3 in his pocket." The appellate court noted that it appeared that "ethnic prejudice somehow had infected the judicial process in the instant case." The appellate court observed that one of the defendant's "plaintive request that she be sentenced 'as for my person, not for my nationality,'" was completely understandable under the circumstances.[53] Could the trial court judge have constitutionally handed down the same sentence in order to deter Colombian drug gangs from operating in the United States?

Statutes that provide different sentences based on gender also have been held to be in violation of the Equal Protection Clause. In *State v. Chambers,* the New Jersey Supreme Court struck down a statute providing indeterminate sentences not to exceed five years (or the maximum provided in a statute) for women, although men convicted of the same crime received a minimum and maximum sentence, which could be reduced by good behavior and work credits.[54]

This complicated scheme resulted in men receiving significantly shorter prison sentences than women convicted of the same crime. For instance, a female might be held on a gambling conviction "for as long as five years . . . [a] first offender male, convicted of the same crime, would likely receive a state prison sentence of not less than one or more than two years." The female offender was required to serve the complete sentence, although the male would "quite likely" receive parole in four months and twenty-eight days. The New Jersey Supreme Court dismissed the argument that the "potentially longer period of detention" for females was justified on the grounds that women were good candidates for rehabilitation who could turn their lives around in prison. The court pointed out that there "are no innate differences [between men and women] in capacity for intellectual achievement, self-perception or self-control or the ability to change attitude and behavior, adjust to social norms and accept responsibility." What was the New Jersey legislature thinking when it adopted this sentencing scheme? Can you think of a crime for which the legislature might constitutionally impose differential sentences based on gender? At least one appellate court in Illinois has upheld a statute that punished a man convicted of incest with his daughter more severely than a woman convicted of incest with her son, reasoning that this furthered the interest in preventing pregnancy.

What about seemingly neutral laws that possess a discriminatory impact? *The general rule is that a defendant must demonstrate both a discriminatory impact and a discriminatory intent.* The difficulty of this task is illustrated by the Supreme Court's consideration of the discriminatory application of the death penalty in *McCleskey v. Kemp*.[55]

Warren McCleskey, an African American, was convicted of two counts of armed robbery and one count of the murder of a Caucasian police officer. He was sentenced to death on the homicide count and to consecutive life sentences on the robbery. McCleskey claimed that the Georgia capital punishment statute violated the Equal Protection Clause in that African American defendants facing trial for the murder of Caucasians were more likely to be sentenced to death. McCleskey

relied on a sophisticated statistical study of 2,000 Georgia murder cases involving 230 variables that had been conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth. This led to a number of important findings, including that defendants charged with killing Caucasian victims were over four times as likely to receive the death penalty as defendants charged with killing African Americans, and that African American defendants were one and one-tenth times as likely to receive the death sentence as other defendants.

The Supreme Court ruled that McCleskey had failed to meet the burden of clearly establishing that the decision makers in his specific case acted with a discriminatory intent to disadvantage McCleskey on account of his race. What of McCleskey's statistical evidence? The Supreme Court majority observed that the statistical pattern in Georgia reflected the decisions of a number of prosecutors in cases with different fact patterns, various defense counsel, and different jurors and did not establish that the prosecutor or jury in McCleskey's specific case or in other cases were biased. McCleskey killed a police officer, a charge that clearly permitted the imposition of capital punishment under Georgia law. Where was the discrimination?

Justice William Brennan, in dissent, criticized the five-judge majority for approving a system in which "lawyers must tell their clients that race casts a large shadow on the sentencing process." Justice Brennan noted that a lawyer, when asked by McCleskey whether McCleskey was likely to receive the death sentence, would be forced to reply that six of every eleven defendants convicted of killing a Caucasian would not have received the death penalty if their victim had been African American. At the same time, among defendants with aggravating and mitigating factors comparable to McCleskey's, twenty of every thirty-four would not have been sentenced to die if their victims had been African American. This pattern of racial bias was particularly significant given the history of injustice against African Americans in the Georgia criminal justice system. The Bureau of National Justice Statistics reports that in 2004, 1,851 Caucasians and 1,390 African Americans were on death row. (Seventy-four additional individuals classified as "other" were also on death row.)

The following facts were presented to a California judge at sentencing. What punishment would you impose?

You Decide

3.2 Defendant Soon Ja Du was convicted of voluntary manslaughter in the killing of Latasha Harlins, a customer in defendant's store. Defendant was sentenced to ten years in state prison. The sentence was suspended (not enforced), and defendant was placed on probation under certain terms and conditions. The district attorney contends the court abused its discretion in granting probation and seeks a . . . legal sentence of an appropriate term in state prison.

The crime giving rise to defendant's conviction occurred on the morning of March 16, 1991, at the Empire Liquor Market, one of two liquor stores owned and operated by defendant and her family. Although Empire Liquor was normally staffed by defendant's husband and son while defendant, Ja Du, worked at the family's other store in Saugus, defendant worked at Empire on the morning of March 16, 1991, so that her son, who had been threatened by local gang members, could work at the Saugus store instead. Defendant's husband, Billy Du, was present at the Empire Liquor Market that morning, but at defendant's urging he went outside to sleep in the family van, because he had worked late the night before.

Defendant was waiting on two customers at the counter when the victim, fifteen-year-old Latasha Harlins, entered the store. Latasha proceeded to the section where the juice was kept, selected a bottle of orange juice, put it in her backpack, and proceeded toward the counter.

Defendant had observed many shoplifters in the store, and it was defendant's experience that people who were shoplifting would take the merchandise, "place it inside the bra or anyplace where the owner would not notice," and then approach the counter, buy some small items and leave. Defendant saw Latasha enter the store, take a bottle of orange juice from the refrigerator, place it in her backpack, and proceed to the counter. Although the orange juice was in the backpack, it was partially visible. Defendant testified that she was suspicious, because she expected if the victim were going to pay for the orange juice, she would have had it in her hand. Defendant's son, Joseph Du, testified that there were at least forty shoplifting incidents a week at the store.

Thirteen-year-old Lakesha Combs and her brother, nine-year-old Ismail Ali, testified that Latasha approached the counter with money ("about two or three dollars") in her hand. According to these witnesses, defendant confronted Latasha, called her a "bitch," and accused her of trying to steal the orange juice; Latasha stated she intended to pay for it. According to defendant, she asked Latasha to pay for the orange juice, and Latasha replied, "What orange juice?" Defendant concluded that Latasha was trying to steal the juice.

Defendant testified that it was Latasha's statement, "What orange juice?" that changed defendant's attitude toward the situation, since prior to that time defendant was not afraid of Latasha. Defendant also thought Latasha might be a gang member. Defendant had asked her son, Joseph Du, what gang members in America look like, and he replied "either they wear some pants and some jackets, and they wear light sneakers, and they either wear a cap or a hairband, headband. And they either have some kind of satchel, and there were some thick jackets. And he told me to be careful with those jackets sticking out." Latasha was wearing a sweater and a "Bruins" baseball cap.

Defendant began pulling on Latasha's sweater in an attempt to retrieve the orange juice from the backpack. Latasha resisted and the two struggled. Latasha hit defendant in the eye with her fist twice. With the second blow, defendant fell to the floor behind the counter, taking the backpack with her. During the scuffle, the orange juice fell out of the backpack and onto the floor in front of the counter. Defendant testified that she thought if she were hit one more time, she would die. Defendant also testified that Latasha threatened to kill her. Defendant picked up a stool from behind the counter and threw it at Latasha, but it did not hit her.

After throwing the stool, defendant reached under the counter, pulled out a holstered .38-caliber revolver, and, with some difficulty, removed the gun from the holster. As defendant was removing the gun from the holster, Latasha picked up the orange juice and put it back on the counter, but defendant knocked it away. As Latasha turned to leave defendant shot her in the back of the head from a distance of approximately three feet, killing her instantly. Latasha had $2 in her hand when she died.

Defendant's husband entered the store [upon hearing defendant's calls for help] and saw Latasha lying on the floor. Defendant leaned over the counter and asked, "Where is that girl who hit me?"

Defendant then passed out behind the counter. Defendant's husband attempted to revive her and also dialed 911 and reported a holdup. Defendant, still unconscious, was transported to the hospital by ambulance, where she was treated for facial bruises and evaluated for possible neurological damage.

At defendant's trial, she testified that she had never held a gun before, did not know how it worked, did not remember firing the gun, and did not intend to kill Latasha.

Defendant's husband testified that he had purchased the .38-caliber handgun from a friend in 1981 for self-protection. He had never fired the gun, however, and had never taught defendant how to use it. In 1988, the gun was stolen during a robbery of the family's store in Saugus. Defendant's husband took the gun to the Empire store after he got it back from the police in 1990.

David Butler, a Los Angeles Police Department ballistics expert, testified extensively about the gun, a Smith & Wesson .38-caliber revolver with a two-inch barrel. In summary, he testified that the gun had been altered crudely and that the trigger pull necessary to fire the gun had been drastically reduced. Also, both the locking mechanism of the hammer and the main spring tension screw of the gun had been altered so that the hammer could be released without putting much pressure on the trigger. In addition, the safety mechanism did not function properly. . . . The jury found defendant guilty of voluntary manslaughter (murder in the heat of passion). By convicting defendant of voluntary manslaughter, the jury impliedly found that defendant had the intent to kill and . . . rejected the defenses that the killing was unintentional and that defendant killed in self-defense.

After defendant's conviction, the case was evaluated by a Los Angeles County probation officer, who prepared a presentence probation report. That report reveals the following about defendant.

At the time the report was prepared, defendant was a fifty-one-year-old Korean-born naturalized American citizen, having arrived in the United States in 1976. For the first ten years of their residence in the United States, defendant worked in a garment factory and her husband worked as a repairman. Eventually, the couple saved enough to purchase their first liquor store in San Fernando. They sold this store and purchased the one in Saugus. In 1989, they purchased the Empire Liquor Market, despite being warned by friends that it was in a "bad area."

These warnings proved prophetic, as the store was plagued with problems from the beginning. The area surrounding the store was frequented by narcotics dealers and gang members, specifically the Main Street Crips. Defendant's son, Joseph Du, described the situation as "having to conduct business in a war zone." In December 1990, defendant's son was robbed while working at the store, and he incurred the wrath of local gang members when he agreed to testify against one of their number who he believed had committed the robbery. Soon thereafter, the family closed the store for two weeks while defendant's husband formulated a plan (which he later realized was "naive") to meet with gang members and achieve a form of truce. The store had only recently been reopened when the incident giving rise to this case occurred.

Joseph Du testified at trial that on December 19, 1990, approximately ten to fourteen African American persons entered the store, threatened him, and robbed him again. The store was burglarized over thirty times, and shoplifting incidents occurred approximately forty times per week. If Joseph tried to stop the shoplifters, "they show me their guns." Joseph further testified that his life had been threatened over thirty times, and more than twenty times people had come into the store and threatened to burn it down. Joseph told his mother about these threats every day, because he wanted to emphasize how dangerous the area was and that he could not do business there much longer.

The probation officer concluded "it is true that this defendant would be most unlikely to repeat this or any other crime if she were allowed to remain free. She is not a person who would actively seek to harm another. . . ." However, she went on to state that although defendant expressed concern for the victim and her family, this remorse was centered largely on the effect of the incident on defendant and her own family. The respondent court found, however, that defendant's "failure to verbalize her remorse to the Probation Department [was] much more likely a result of cultural and language barriers rather than an indication of a lack of true remorse."

The probation report also reveals that Latasha had suffered many painful experiences during her life, including the violent death of her mother. Latasha lived with her extended family (her grandmother, younger brother and sister, aunt, uncle and niece) in what the probation officer described as "a clean, attractively furnished three-bedroom apartment" in south central Los Angeles. Latasha had been an honor student at Bret Hart Junior High School, from which she had graduated the previous spring. Although she was making only average grades in high school, she had promised that she would bring her grades up to her former standard. Latasha was involved in activities at a youth center as an assistant cheerleader, member of the drill team, and summer junior camp counselor. She was a good athlete and an active church member.

The probation officer's ultimate conclusion and recommendation was that probation be denied and defendant sentenced to state prison. The court sentenced defendant to ten years in state prison (six years for the base term and four for the gun use). The sentence was suspended (not enforced), and defendant was placed on probation for a period of five years with the usual terms and conditions and on the condition that she pay

$500 to the restitution fund and reimburse Latasha's family for any out-of-pocket medical expenses and expenses related to Latasha's funeral. Defendant was also ordered to perform 400 hours of community service. The court did not impose any jail time as a condition of probation. The trial judge possessed the option of sentencing Du to prison for three, six, or eleven years and an additional four years for the use of a gun.

What are the objectives of sentencing? Were these goals achieved by a sentence of probation? Under California law, probation is not to be granted for an offense involving the use of a firearm other than under certain conditions. These include whether the crime was committed under unusual circumstances, such as great provocation. Other conditions are whether the carrying out of the crime indicated criminal sophistication and whether the defendant will be a danger to others in the event he or she is not incarcerated. See *People v. Superior Court,* 7 Cal. Rptr. 2d 177 (1992).

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

The distinguishing characteristic of a criminal offense is that it is subject to punishment. Categorizing a law as criminal or civil has consequences for the protections afforded to a defendant, such as the prohibition against double jeopardy. Punishment is intended to accomplish various goals, including retribution, deterrence, rehabilitation, incapacitation, and restoration. Judges seek to accomplish the purposes of punishment through penalties ranging from imprisonment, fines, probation, and intermediate sanctions to capital punishment. Assets forfeiture may be pursued in a separate proceeding.

The federal government and the states have initiated a major shift in their approach to sentencing. The historical commitment to indeterminate sentencing and to the rehabilitation of offenders has been replaced by an emphasis on deterrence, retribution, and incapacitation. This primarily involves presumptive sentencing guidelines and mandatory minimum sentences. Several recent U.S. Supreme Court cases appear to have resulted in sentencing guidelines that are advisory rather than binding on judges. A sentence, whether inside or outside the guidelines, only is required to be "reasonable."

Truth in sentencing laws are an effort to ensure that offenders serve a significant portion of their sentences and are intended to prevent offenders from being released by parole boards who determine that offenders have exhibited progress toward rehabilitation. We also have seen the development of a greater sensitivity to victims' rights.

Constitutional attacks on sentences are typically based on the Eighth Amendment prohibition on the imposition of cruel and unusual punishment. The U.S. Supreme Court has ruled that the prohibition against cruel and unusual punishment applies to the federal government as well as to the states, and virtually every state constitution contains similar language. Professor Wayne LaFave lists three approaches to interpreting the clause: (1) it limits the *methods* employed to inflict punishment, (2) it restricts the *amount of punishment* that may be imposed, and (3) it *prohibits* the criminal punishment of certain acts. The Equal Protection Clause provides an avenue to challenge statutes and sentencing practices that result in different penalties for individuals based on their race, religion, gender, and ethnicity.

The effort to ensure uniform approaches to sentencing is exemplified by the procedural protections that surround the death penalty. Legal rulings under the Eighth Amendment have limited the application of capital punishment to a narrow range of aggravated homicides committed by adult offenders. The imposition of capital punishment on juveniles was held disproportionate in *Roper v. Simmons*. Constitutional challenges under the Eighth Amendment have proven unsuccessful against mandatory minimum sentences, as illustrated by the federal court's upholding of Three Strikes and You're Out laws and determinate penalties for drug possession. Judges have generally deferred to the decision of legislators and have ruled that penalties for terms of years are proportionate to the offenders' criminal acts. The U.S. Supreme Court has stressed that such challenges should be upheld on "extremely rare" occasions where the sentence is "grossly disproportionate" to the seriousness of the offense. The reconsideration of the disparity in treatment between crack and powder cocaine is a significant step in the lessening the harshness of drug laws.

Criminal sentences may not be based on the "suspect categories" of race, gender, religion, ethnicity, and nationality. Despite the condemnation of racial practices in the criminal justice system, the due process procedures surrounding the death penalty do not appear to have eliminated racial disparities in capital punishment. An equal protection challenge to the application of capital punishment, however, proved unsuccessful in *McCleskey v. Kemp*.

As you read the cases in the next chapters of the textbook, pay attention to the sentences handed down to defendants by the trial court. Consider what sentence you believe the defendant deserved.

Chapter Review Questions

1. Distinguish between civil disabilities and criminal punishments. Why did the Supreme Court rule that the sanction provided for in Megan's Law was not a criminal punishment?
2. Discuss the purposes of punishment. Which do you believe should be the primary reason for criminal punishment?

3. What are some types of sentences that a court may impose?
4. List several of the criteria that are used to evaluate approaches to sentencing. Which do you believe is most important?
5. Describe the various approaches to sentencing. Contrast indeterminate and determinate sentencing. What approach do you favor?
6. Why were sentencing guidelines introduced? How were the guidelines affected by recent Supreme Court decisions?
7. Describe truth in sentencing laws.
8. What types of protections are included within victims' rights?
9. List the three protections provided under the Eighth Amendment.
10. How do courts determine whether a method of punishment is prohibited under the Eighth Amendment? Does lethal injection constitute cruel and unusual punishment?
11. Discuss the efforts of the Supreme Court to ensure that the death penalty is applied in a proportionate fashion.
12. Why did the Supreme Court rule that it is cruel and unusual punishment to execute juveniles?
13. What is the approach of courts that are asked to decide whether a sentence for a "term of years" is proportionate to the crime? Why do judges take such a hands-off approach in this area?
14. Why is it a violation of equal protection for race, gender, religion, ethnicity, or nationality to play a role in sentencing?
15. What is the legal test for determining whether a law that is neutral on its face is in violation of the Equal Protection Clause?
16. Outline the debate over whether the possession of crack cocaine should be punished more severely than the possession of powder cocaine. What is the approach under the federal sentencing guidelines and in most states?

Legal Terminology

assets forfeiture
beyond a reasonable doubt
clemency
concurrent sentences
consecutive sentences
determinate sentencing
disparity
Eighth Amendment
general deterrence
incapacitation
indeterminate sentencing
just deserts
mandatory minimum sentences
Megan's Law
pardon
plea bargain
preponderance of the evidence
presumptive sentencing guidelines
proportionality
rehabilitation
restoration
retribution
selective incapacitation
Son of Sam laws
specific deterrence
status offenses
Three Strikes and You're Out law
truth in sentencing laws
victim impact statements

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. The Death Penalty Information Center provides information on capital punishment. You will also want to read about the death penalty around the world.
2. You can find reports on race and gender in sentencing on the Web site of The Sentencing Project.
3. The Justice Policy Institute has reports on the Three Strikes laws that you can find on the Web site of this nonprofit research organization.

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4 Actus Reus

Did the defendant act voluntarily in killing his brother-in-law?

Family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world."...Dr. Harrell clearly testified that in his opinion defendant was unable to exercise conscious control of his physical actions at the moment of the fatal shooting. He stated further, "I think he was acting sort of like a robot. He was acting like an automaton....When he goes into the altered state of consciousness,...then he engages in a motor action." This testimony...if accepted by the jury, "exclude[d] the possibility of a voluntary act without which there can be no criminal liability...."

Core Concepts and Summary Statements

Introduction

A crime requires proof beyond a reasonable doubt of an *actus reus*, a criminal act, as well as a criminal intent, or *mens rea*.

Criminal Acts

The criminal law punishes acts, not thoughts. A criminal intent without an act is not punishable.

A Voluntary Act

A crime requires a voluntary act.

Status Offenses

A status such as "homeless person" may not constitute a crime. Due process requires proof of a criminal act.

Omissions

A failure to fulfill a duty to act may qualify as an *actus reus*.

Possession

The possession of a dangerous item, such as drugs or explosives, may constitute a crime.

Introduction

A crime comprises an ***actus reus***, or a criminal act or omission, and a ***mens rea***, or a criminal intent. Conviction of a criminal charge requires evidence establishing beyond a reasonable doubt that the accused possessed the required mental state and performed a voluntary act that caused the social harm condemned in the statute.[1]

There must a concurrence between the *actus reus* and *mens rea*. For instance, common law burglary is the breaking and entering of the dwelling house of another at night with the intent to commit a felony. A backpacker may force his or her way into a cabin to escape the sweltering summer heat and, once having entered, find it impossible to resist the temptation to steal hiking equipment. The requisite intent to steal developed following the breaking and entering, and our backpacker is not guilty of common law burglary.[2] The requirement of concurrence is illustrated by the California Penal Code, which provides that "in every crime . . . there must exist a union or joint operation of act and intent. . . ."[3]

Actus reus generally involves three elements or components: (1) a voluntary act or failure to perform an act (2) that causes (3) a social harm condemned under a criminal statute. Homicide, for instance, involves the voluntary shooting or stabbing (act) of another human being that results in (causation) death (social harm).[4] The Indiana Criminal Code provides that a "person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense . . . [A] person who omits to perform an act commits an offense only if he has a statutory, common law, or contractual duty to perform the act."[5]

First, keep in mind that an act may be innocent or criminal depending on the context or **attendant circumstances**. Entering an automobile, turning the key, and driving down the highway may be innocent or criminal depending on whether the driver is the owner or a thief. Second, crimes require differing attendant circumstances. An assault on a police officer requires an attack on a law enforcement official; an assault with a dangerous weapon involves the employment of an instrument capable of inflicting serious injury, such as a knife or firearm. A third point is that some offenses require that an act cause a specific harm. Homicide, for instance, involves an act that directly causes the death of the victim, while false pretenses require that an individual obtain title to property through the false representation of a fact or facts. In the case of these so-called **result crimes**, the defendant's act must be the "actual cause" of the resulting harm. An individual who dangerously assaults a victim who subsequently dies may not be guilty of homicide in the event that the victim would have lived and her death was caused by the gross negligence of an ambulance driver.

This chapter covers *actus reus*. We first discuss the requirement of an act and then turn our attention to status offenses, omissions, and possession. Chapter 5 addresses criminal intent, concurrence, and causality, and we will apply these concepts to specific crimes in Chapters 10 through 15. At this point, merely appreciate that a crime consists of various "elements" or components that the prosecution must prove beyond a reasonable doubt.

Criminal Acts

Scholars have engaged in a lengthy and largely philosophical debate over the definition of an "act." It is sufficient to note that the modern view is that an act involves a bodily movement, whether voluntary or involuntary.[6] The significant point is that the *criminal law punishes voluntary acts and does not penalize thoughts*. Why?

- This would involve an unacceptable degree of governmental intrusion into individual privacy.
- It would be difficult to distinguish between criminal thoughts that reflect momentary anger, frustration, or fantasy, and thoughts involving the serious consideration of criminal conduct.
- Individuals should only be punished for conduct that creates a social harm or imminent threat of social harm and should not be penalized for thoughts that are not translated into action.
- The social harm created by an act can be measured and a proportionate punishment imposed. The harm resulting from thoughts is much more difficult to determine.

An exception to this rule was the historical English crime of "imagining the King's death." How should we balance the interest in freedom of thought and imagination against the social interest in the early detection and prevention of social harm in the case of an individual who records dreams of child molestation in his or her private diary?

A Voluntary Criminal Act

A more problematic issue is the requirement that a crime consist of a **voluntary act**. The Indiana Criminal Law Study Commission, which assisted in writing the Indiana statute on criminal conduct, explains that voluntary simply means a conscious choice by an individual to commit or not to commit an act.[7] In an often-cited statement, Supreme Court Justice Oliver Wendell Holmes, Jr. observed that a "spasm is not an act. The contraction of the muscles must be willed."[8] Professor

Joshua Dressler compares an involuntary movement to the branch of a tree that is blown by the wind into a passerby.[9]

The requirement of a voluntary act is based on the belief that it would be fundamentally unfair to punish individuals who do not consciously choose to engage in criminal activity and who therefore cannot be considered morally blameworthy. There also is the practical consideration that there is no need to deter, incapacitate, or rehabilitate individuals who involuntarily engage in criminal conduct.[10]

A North Carolina court of appeals ruled that a jury hearing the case of a defendant charged with taking indecent liberties with his girlfriend's eight-year-old daughter should have been instructed that "if they found that defendant was unconscious or, more specifically, asleep, they must find the defendant not guilty."[11] In another case, the Kentucky Supreme Court ruled that a defendant, who claimed that he was a "sleepwalker," should not be convicted in the event that he was "unconscious when he killed the deceased."[12]

The criminal defense of involuntariness has been unsuccessfully invoked by individuals charged with criminal negligence while operating a motor vehicle. In the frequently cited case of *People v. Decina,* the defendant's automobile jumped a curb and killed four children. The appellate court affirmed Decina's conviction despite the fact that the accident resulted from an epileptic seizure. The judges reasoned that the statute "does not necessarily contemplate that the driver be conscious at the time of the accident" and that it is sufficient that the defendant knew of his medical disability and knew that it would interfere with the operation of a motor vehicle.[13]

Some defendants have actually managed to be acquitted by persuading judges or juries that their crimes were **involuntary acts**. A California court of appeals concluded that the evidence supported the "inference" that a defendant who had been wounded in the abdomen had shot and killed a police officer as a reflex action and was in a "state of unconsciousness."[14]

The next case in the textbook, *State v. Fields,* challenges you to determine whether the defendant's act should be considered involuntary or voluntary.

Model Penal Code

The Model Penal Code section 2.01 defines the Requirement of Voluntary Act as follows:

1. A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

2. The following are not voluntary acts within the meaning of this Section:
   a. a reflex or convulsion;
   b. a bodily movement during unconsciousness or sleep;
   c. conduct during hypnosis or resulting from hypnotic suggestion;
   d. a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

Analysis

The Model Penal Code requires that the guilt of a defendant should be based on conduct that *includes* a voluntary act or omission. An individual who is aware of a serious heart defect who voluntarily drives an automobile may be liable for harm resulting from an accident he or she causes while having a heart attack, based on the fact that he or she voluntarily drove the automobile or failed to stop as he or she began to feel ill. The Model Penal Code avoids the difficulties involved in defining voluntary conduct and, instead, lists the type of conditions that are not voluntary. Section 2(d) encompasses a range of unspecified conditions.

The Legal Equation

Actus reus	=	A voluntary act or failure to perform an act.
Voluntary act	=	A bodily movement that is the product of a conscious choice.

Was the defendant entitled to a jury instruction on unconsciousness?

State v. Fields, *376 S.E.2D 740 (N.C. 1989), Opinion by: Whichard, J.*

Defendant was convicted of first degree murder.... The trial court sentenced him to life imprisonment. We award a new trial for error in refusing a requested jury instruction.

Facts

The State's evidence, in pertinent summary, showed the following: Connie Williams, defendant's half-sister, testified that she had been dating Isaiah Barnes, the victim, for two years at the time of his death. On September 18, 1986, the couple was drinking liquor at Robert Cobb's house. . . .

Cobb testified that defendant and his girlfriend were at his house when Williams and Barnes arrived. Defendant offered Williams a drink and left soon thereafter. Before leaving, defendant "played some numbers" with Cobb. Williams and Barnes also left Cobb's house, but returned later that evening. Williams and Barnes were sitting on a trunk in Cobb's bedroom, drinking and talking. Cobb and his friend, Joyce Ann Pettaway, also were talking in the bedroom. Defendant entered the bedroom about midnight. He called Cobb by a nickname, "Snow." Defendant asked Cobb to keep the ticket for the numbers he had played, saying, "If I hit, I want you to get the money and keep it until you see me." Cobb asked why defendant could not keep it himself, and defendant answered, "You'll see."

Defendant and Barnes had not spoken to one another . . . defendant then walked around the foot of the bed, pulled a gun out of his belt, and shot Barnes. Barnes fell on the floor. Pettaway cried, "Oh, Lord have mercy. Please don't shoot that man anymore." Defendant turned toward her and said, "Shut up," then shot Barnes again as he lay on the floor gasping for breath. Cobb told defendant to get out of his house because he was calling "the law." Defendant said, "Okay, Snow," and walked out.

Wallace Fields, defendant's brother, testified on defendant's behalf. He recounted the difficult circumstances of their childhood. Their stepfather, called "Dump," drank regularly and beat the children and their mother. They had little money and were often hungry. When Dump was on a rampage, the mother and children would often sleep outside to avoid him.

One night when defendant was fourteen, Dump held a knife to defendant's mother's throat and threatened to kill her. Defendant grabbed a gun and shot Dump, killing him. Wallace Fields testified that up to the time of this incident, defendant was a normal boy who liked to play and go to school. After the shooting, defendant had nightmares and became "a different person," acting as if he were "in his own world." Defendant was extremely devoted to his mother, helping her cook and clean and giving her money.

Wallace Fields further testified that his sister, Connie Williams, had become a different person since beginning her relationship with Barnes. She often appeared bruised and beaten and cared little for her appearance.

Willard Mills, defendant's stepbrother, also testified regarding defendant's devotion to his mother. Mills stated that Connie Williams became dependent on alcohol or drugs and lost all interest in her family and appearance after she became involved with Barnes. Defendant and his brothers were worried about Connie and frequently discussed how to help her.

Mills reported that defendant had become very morose after the childhood shooting incident. As

defendant grew older, Mills advised him to put it all behind him and join the service. While in service, another soldier performed a trick in which the soldier put lighter fluid in his mouth, lit it, and blew out the flames. Defendant saw his stepfather's face in the flames and ran away. He was hospitalized for several months following this episode. Mills testified that defendant was concerned about Barnes's drinking and tried to persuade him to stop, but that defendant bore Barnes no malice. Ten days after shooting Barnes, defendant called Mills. Mills picked up defendant at the bus station and took him to the Tarboro police station to turn himself in.

Agnes Williams, defendant's mother, testified that defendant's nerves had been bad ever since the incident with Dump. Defendant had a nervous breakdown in the service and was never the same afterward. Defendant's nerves were "just racked all to pieces" over Connie Williams's problems.

Dr. Evans Harrell, a psychologist, testified on defendant's behalf. . . . He stated that after defendant killed Dump, he felt very protective toward his mother and sisters. Defendant felt guilty about the family being left without a father figure, and he tried to assume that role. Defendant suffered from frequent nightmares featuring Dump and often felt Dump's presence even when awake. In Dr. Harrell's opinion, defendant suffered from post-traumatic stress disorder, and certain aspects of his behavior were characteristic of a disassociative state. Dr. Harrell described a disassociative state as a sudden temporary alteration in the state of consciousness, during which defendant would not remember what happened and did not intend to do anything, "like his mind and his body weren't connected."

Dr. Harrell recounted what defendant related to him about the killing of Isaiah Barnes. Defendant told Dr. Harrell he had tried to get his sister Connie to leave Cobb's house that night, because he was worried about her drinking. Connie's arm was bandaged from a burn, which she attributed to an accident but which defendant and the family suspected Barnes inflicted. Defendant saw Barnes reach out and grab Connie, and Connie grimaced in pain. At this point defendant pulled out the gun and shot Barnes. Defendant told Dr. Harrell he had not planned to kill Barnes, had not thought of killing Barnes, and even as he shot him, was not thinking of killing Barnes. Defendant denied any memory of firing a second shot. Instead, defendant was seeing Dump and his mother "and all of these things flashing before [him] in a blur."

Dr. Harrell testified that defendant perceived Barnes to be treating Connie the same way Dump had treated defendant's mother. . . . In Dr. Harrell's opinion, defendant did not plan or intend to shoot Barnes and was unable to exercise conscious control of his physical actions at that moment. Dr. Harrell concluded, "I think he was acting sort of like a robot. He was acting like an automaton." Dr. Harrell testified that defendant told him he had been drinking on the night of the shooting but did not tell him how much he had had to drink.

Issue

Defendant assigns error to the trial court's refusal to instruct the jury on the defense of unconsciousness. This defense, also called automatism, has been defined as connoting the state of a person who, though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implies that there must be some attendant disturbance of conscious awareness. Undoubtedly automatic states exist, and medically they may be defined as conditions in which the patient may perform simple or complex actions in a more or less skilled or uncoordinated fashion without having full awareness of what he is doing. . . .

Reasoning

Defendant's evidence tended to show that immediately preceding and during the killing of his victim, he was unconscious. Family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world." In the context of this testimony, and on the basis of a personal and family history obtained from defendant and members of his family, Dr. Harrell testified that in his opinion defendant suffered from post-traumatic stress disorder and was prone to experiencing disassociative states. In Dr. Harrell's opinion, defendant was in a disassociative state when he shot the victim. Dr. Harrell testified that the defendant "was acting sort of like a robot" and "like an automaton." . . . "When Isaiah reached out and grabs Connie's arm and Connie grimaces, and his whole past life and material that is so similar in his mind to what he's seen, flashes before him, then he engages in a motor action. . . ."

This testimony, if believed, permits a jury finding that defendant was unable to exercise conscious control of his physical actions when he shot the victim. The defendant thus was entitled to the unconsciousness or automatism jury instruction stating that the defense of unconsciousness does not apply to a case in which the mental state of the person in question is

> due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, sleepwalkers or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind. . . .

Holding

The defendant's evidence . . . merited the requested instruction on unconsciousness or automatism. . . . As noted above, family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world." . . . Dr. Harrell clearly testified that in his opinion defendant was unable to exercise conscious control of his physical actions at the moment of the fatal shooting. He stated further, "I think he was acting sort of like a robot. He was acting like an automaton. . . . When he goes into the altered state of consciousness, . . . then he engages in a motor action." This testimony, combined with the family members' testimony, if accepted by the jury, "exclude[d] the possibility of a voluntary act without which there can be no criminal liability. . . ." Therefore, an instruction on the legal principles applicable to the unconsciousness or automatism defense was required. . . . .

Questions for Discussion

1. Why is unconsciousness or automatism a criminal defense? What facts support the defendant's contention that the killing of Barnes was an unconscious automatic act?
2. What facts undermine the contention that Fields shot Barnes as an act of unconsciousness or automatism? Why, for instance, was Fields carrying a pistol? Did he have a motive for killing Barnes? Was his conduct consistent with an individual displaying "disassociation"? Are the witnesses cited by the court neutral and objective or biased? Were you persuaded by Dr. Harrell's testimony?
3. Should unconsciousness or automatism reduce the seriousness of an offense rather than constitute an absolute defense? What about holding Fields guilty for reckless homicide based on the fact that he was irresponsible for not seeking medical treatment for his severe emotional problems?
4. The North Carolina Supreme Court distinguishes unconsciousness or automatism from insanity. What is the difference between these two concepts? Under what circumstances is a defendant entitled to the jury receiving an unconsciousness or automatism jury instruction?

Cases and Comments

Sleepwalking. The first American case to recognize the defense of sleepwalking or somnambulism involved the acquittal in 1846 of Albert Tirrell for the murder of his mistress and the arson of her Boston brothel. This was followed in 1879 by the Kentucky case, *Fain v. Commonwealth,* 78 Ky. 183, in which sleepwalking was recognized as a defense for homicide. Over 120 years later, Adam Kieczykowski, age nineteen, was acquitted of the burglary of a number of dorm rooms at the University of Massachusetts Amherst and of sexual assault. In 2003, twenty-four-year-old Marc Reider was acquitted of aggravated manslaughter based on a jury's determination that he was "sleep-driving." An even more startling case was an English jury's 2005 acquittal of British bartender James Bilton for raping a woman three times.

In 2002, Timothy Stowell was convicted by a California appellate court of digital penetration and of lewd actions "upon a four-year-old female." Stowell was found in bed with Tracie and her daughter Taylor, who were spending the night with Stowell and his girlfriend LeeAnne. Stowell and LeeAnne were sleeping in the living room while Tracie and Taylor slept in the bedroom. At trial, Stowell testified that he did not know "how he came to be in bed" with Taylor and that the last thing that he recalled from that evening was watching a film on television and then "waking up to Tracie yelling, 'What the hell is going on?'"

The appellate court affirmed the trial court judge's refusal to instruct the jury that they should acquit Stowell if after reviewing the evidence "you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed." The appellate court noted that while Stowell and LeeAnne had testified that Stowell had walked in his sleep on various occasions, he did not claim that he had been sleepwalking on the night of the molestation. There also was no testimony that he had engaged in similar types of sexual behavior when he previously had been sleepwalking. At the time of his arrest, Stowell did not explain to the police that he had been sleepwalking, and he raised the sleepwalking defense for the first time at trial. The last point made by the appellate court was that while studies indicate that sleepwalkers are able to unlock doors and operate machinery, there was no expert testimony presented at trial documenting that a sleepwalker could have undressed and sexually molested a four-year-old. The appellate court concluded that Stowell's claim that he had been sleepwalking and had unconsciously molested Taylor simply was not supported by substantial evidence.

Should the criminal law recognize the "involuntariness" defense of sleepwalking? See *People v. Stowell,* 202 WL 1068259 (Cal. App. 2002).

You Decide

4.1 On November 1, 1996, Pamela Reed entered a Wal-Mart store in Hendricks County, Indiana. She grabbed a Rubbermaid tote off the shelf and placed it in her shopping cart. Reed then continued through the store and placed several items in the tote, including a computer printer, ink jet labels, computer software packages, and some toy cars. She then left the store with roughly $500 worth of merchandise without paying.

Reed was detained in the parking lot and taken back into the store. She claimed that she believed that she had paid for the items and did not understand why she was being detained. Reed stated that she had a letter in the car from her doctor that would excuse the theft. She then claimed that she was feeling ill, and an ambulance was called that transported her to the hospital. Reed subsequently was charged with theft and filed a motion to dismiss the charges.

Reed's primary-care physician, Dr. Roger Collicott, wrote a letter stating that on the day of the theft, she suffered from a transient ischemic attack (TIA). The trial court, in considering Reed's motion, heard evidence from Dr. Brian Teel, a clinical psychologist, who testified that TIA, commonly known as "small stroke," involves a constriction of blood vessels and a decreased pulse rate that causes a person to lose oxygen to the brain. Teel further testified that a patient suffering from this syndrome might be "totally unaware of [her] surroundings and yet repeatedly going through common tasks that we've done a hundred times, a thousand times," enabling her to complete tasks "without the awareness of what [she's] doing." Dr. Collicott's assistant testified that when Reed appeared at the doctor's office following the theft, she seemed "far off" and "confused" and left without making a return appointment.

Reed reportedly left work early on the day prior to the theft due to a headache, and the following day she submitted a report that was full of errors. The trial court did not permit this evidence to be presented to the jury and instructed the jurors to disregard the testimony of witnesses who testified that Reed was confused and disoriented on the day of the theft. The appellate court remanded the case for a new trial and called the trial court's attention to the fact that evidence of TIA was relevant in determining the voluntariness of Pamela Reed's criminal conduct.

Did Reed voluntarily steal the merchandise from the store? See *Reed v. State,* 693 N.E.2d 988 (Ind. App. 1998).

You can find the answer at www.sagepub.com/lippmanccl2e

Status Offenses

Can you be criminally convicted of being a drunk or drug addict or a common thief? Or for a violent personality? The commentary to Model Penal Code section 2.01 stresses that a crime requires an act and that individuals may not be punished based on a mere status or condition. The code cites as an example the 1962 U.S. Supreme Court decision in *Robinson v. California,* which, as you might recall from Chapter 3, held that it was cruel and unusual punishment under the Eighth and Fourteenth amendments to convict Robinson of the **status offense** of being "addicted to the use of narcotics."[15]

In *Robinson,* Los Angeles police officers observed scar tissue and discoloration on Robinson's arms that was consistent with the injection of drugs. Robinson was convicted by a jury under a statute that declared it a misdemeanor for a person "either to use narcotics or to be addicted to the use of narcotics." The verdict was based on Robinson's status as a narcotics addict rather than for the act of using narcotics or for other illegal acts such as the manufacture, selling, transport, or purchase of narcotics. The Supreme Court reversed Robinson's criminal conviction and condemned the fact that Robinson could be held "continuously guilty . . . whether or not he ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior [in California]."

Holding Robinson liable for his status as an addict seemed particularly unfair given that four judges viewed narcotics addiction as a disease. Justice Potter Stewart explained that it was "cruel and unusual punishment to condemn Robinson for an illness, which like being mentally or physically challenged or leprosy, may be contracted innocently or involuntarily."

Eight years later, the U.S. Supreme Court issued a decision in *Powell v. Texas*. Powell was arrested for "being found in a state of intoxication in a public place." The Texas law was aimed at preventing the disruptive behavior accompanying public drunkenness. Powell claimed that his conviction was based on his status as a chronic alcoholic and that the law constituted cruel and unusual punishment. The Supreme Court rejected this argument and ruled in a five-to-four decision that Powell was not convicted for being a chronic alcoholic, but for his public behavior that posed "substantial health and safety hazards, both to himself and for members of the general public." Justice White was the fifth justice in the *Powell* majority. White agreed with the dissent that alcoholism was a disease but concurred in the majority decision based on his determination

that Powell was capable of "making plans to avoid his being found drunk in public." Justice White cautioned that he believed that it would constitute cruel and unusual punishment to convict and punish chronic alcoholics who were homeless, because such individuals "have no place else to go and no place else to be when they are drinking."

The Supreme Court majority in *Powell* dismissed the argument that alcoholism was a disease similar to drug addiction and that *Robinson*'s condemnation of status offenses should be expanded to encompass Powell's irresistible compulsion to appear drunk in public. A shift of Justice White's vote would have resulted in a different outcome. Would this prove a dangerous doctrine? The next step might involve sex offenders claiming that their criminal acts are an expression of a sexually dysfunctional personality or violent offenders contending that their behavior resulted from their antisocial personalities.

In *People v. Kellogg,* the Superior Court of San Diego, California, confronted an appellant who contended that his criminal convictions for public intoxication unconstitutionally punished him for his status as a homeless, chronic alcoholic. Is Kellogg's claim persuasive?

Was Kellogg convicted for the status of being a homeless, chronic alcoholic?

People v. Kellogg, *14 CAL. RPTR. 3D 507 (CAL. APP. 2004), Opinion by: Haller, J.*

Facts

On January 10, 2002, Officer Heidi Hawley, a member of the Homeless Outreach Team, responded to a citizen's complaint of homeless persons camping under bridges and along State Route 163. She found Kellogg sitting on the ground in some bushes on the embankment off the freeway. Kellogg appeared inebriated and was largely incoherent. He was rocking back and forth, talking to himself, and gesturing. Officer Hawley arrested Kellogg for public intoxication. He had $445 in his pocket from disability income.

In February 2001, Kellogg had accepted an offer from the Homeless Outreach Team to take him to Mercy Hospital. However, on three other occasions when Officer Hawley had offered Kellogg assistance from the Homeless Outreach Team, he had refused.

After his arrest on January 10, 2002, Kellogg posted $104 cash bail and was released. Because he was homeless, he was not notified of his court date, and he did not appear for his January thirty-first arraignment. A warrant for his arrest was issued on February 11, 2002; he was arrested again for public intoxication on February nineteenth and twenty-seventh and subsequently charged with three violations of section 647(f), prohibiting public intoxication.

After a pretrial discussion in chambers about Kellogg's physical and psychological problems, the trial court conditionally released Kellogg on his own recognizance and ordered that he be escorted to the Department of Veterans Affairs hospital (VA) by Officer Hawley. He was not accepted for admission at the hospital and accordingly was returned to county jail. Kellogg pleaded not guilty and filed a motion to dismiss the charges based on his constitutional right to be free of cruel and unusual punishment.

Psychologist Gregg Michel and psychiatrist Terry Schwartz testified on behalf of Kellogg. These experts explained that Kellogg had a dual diagnosis. In addition to his severe alcohol dependence, which caused him to suffer withdrawal symptoms if he stopped drinking, he suffered from dementia, long-term cognitive impairment, schizoid personality disorder, and symptoms of post-traumatic stress disorder. He had a history of seizure disorder and a closed head injury, and he reported anxiety, depressive symptoms, and chronic pain. He was estranged from his family. Physically, he had peripheral edema, gastritis, acute liver damage, and ulcerative colitis requiring him to wear a colostomy bag. To treat his various conditions and symptoms, he had been prescribed Klonopin and Vicodin, and it was possible that he suffered from addiction to medication.

Dr. Michel opined that Kellogg was gravely disabled and incapable of providing for his basic needs and that his degree of dysfunction was life-threatening. His mental deficits impeded his executive functioning (planning, making judgments) and memory. . . . Drs. Michel and Schwartz opined that Kellogg's homelessness was not a matter of choice but a result of his gravely disabled mental condition. His chronic alcoholism and cognitive impairment made it nearly impossible for him to obtain and maintain an apartment without significant help and support. . . . Dr. Schwartz explained that for a person with Kellogg's conditions, crowded homeless shelters can be psychologically disturbing and trigger post-traumatic stress or anxiety symptoms, causing the person to prefer to hide in a bush where minimal interactions with people would occur. Additionally, a homeless person such as Kellogg, particularly when intoxicated, might refuse offers of assistance from authorities, because he has difficulty trusting people and fears his situation, although bad at present, will worsen.

In Dr. Michel's view, Kellogg's incarceration provided some limited benefit in that he obtained medication for seizures, did not have access to alcohol, received some treatment, and was more stable during incarceration than he was when homeless on the streets. However, such treatment was insufficient to be therapeutic, and medications prescribed for inmate management purposes can be highly addictive and might not be medically appropriate.

Testifying for the prosecution, physician James Dunford stated that at the jail facility, medical staff assess the arrestee's condition and provide treatment as needed, including vitamins for nutritional needs and medication to control alcohol withdrawal symptoms or other diseases such as hypertension, seizure disorders, and diabetes. . . . Dr. Dunford opined that between March second and seventh, Kellogg's condition had improved, because his seizure medicine was restarted, his alcohol withdrawal was treated, his vital signs were stable, his colostomy bag was clean and intact, his overall cleanliness was restored, and he was interacting with people in a normal way.

After the presentation of evidence, the trial court found that Kellogg suffered from both chronic alcohol dependence and a mental disorder and was homeless at the time of his arrests. Further, his alcohol dependence was both physical and psychological and caused him to be unable to stop drinking or to engage in rational choice-making. Finding that before his arrest Kellogg was offered assistance on at least three occasions and that his medical condition improved while in custody, the court denied the motion to dismiss the charges. On April 2, 2002, the court found Kellogg guilty of one charge of violating section 647(f) arising from his conduct on January 10, 2002. At sentencing on April thirtieth, the probation officer requested that the hearing be continued for another month, so Kellogg could be evaluated for a possible conservatorship.

After expressing the difficult "Hobson's choice" whereby there were no clear prospects presented to effectively assist Kellogg, the court sentenced him to 180 days in jail, with execution of sentence suspended for three years on the condition that he complete an alcohol treatment program and return to court on June 4, 2002, for a progress review. . . .

After Kellogg's release from jail, defense counsel made extensive, but unsuccessful, efforts to place Kellogg in an appropriate program and to find a permanent residence for him. On May 25 and 28, 2002, he was again arrested for public intoxication. After he failed to appear at his June fourth review hearing, his probation was summarily revoked. Kellogg was rearrested on June twelfth. After a probation revocation hearing, Kellogg's probation was formally revoked, and he was ordered to serve the 180-day jail sentence. The court authorized that his sentence be served in a residential rehabilitation program. However, no such program was found. According to defense counsel, the VA concluded Kellogg could not benefit from its residential treatment program due to his cognitive defects. Further, his use of prescribed, addictive narcotics precluded placement in other residential treatment programs, and his iliostomy precluded placement in board and care facilities. On July 11, 2003, the appellate division of the superior court affirmed the trial court's denial of Kellogg's motion to dismiss on Eighth Amendment grounds. We granted Kellogg's request to have the matter transferred to this court for review.

Issue

Section 647(f) defines the misdemeanor offense of disorderly conduct by public intoxication as occurring when a person

> is found in any public place under the influence of intoxicating liquor . . . in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor . . . interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

Kellogg argues that this statute, as applied to him, constitutes cruel and/or unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution and article 1 section 17 of the California Constitution. He asserts that his chronic alcoholism and mental condition have rendered him involuntarily homeless and that it is impossible for him to avoid being in public while intoxicated. He argues because his public intoxication is a result of his illness and beyond his control, it is inhumane for the State to respond to his condition by subjecting him to penal sanctions.

Reasoning

It is well settled that it is cruel and unusual punishment to impose criminal liability on a person merely for having the disease of addiction. In *Robinson v. California* 370 U.S. 660, 666–667 (1962), the U.S. Supreme Court invalidated a California statute that made it a misdemeanor to "be addicted to the use of narcotics." The *Robinson* Court recognized that a state's broad power to provide for the public health and welfare made it constitutionally permissible for it to regulate the use and sale of narcotics, including, for example, such measures as penal sanctions for addicts who refuse to cooperate with compulsory treatment programs. But the Court found the California penal statute unconstitutional, because it did not require possession or use of narcotics, or disorderly behavior resulting from narcotics, but rather imposed criminal liability for the mere status of being addicted. *Robinson* concluded that just as it would be cruel and unusual punishment to make it a criminal offense to be mentally ill or a leper, it was likewise cruel and unusual to allow a criminal conviction for the disease of addiction without requiring proof of narcotics possession or use or antisocial behavior.

In *Powell v. Texas,* 392 U.S. 514 (1968), the U.S. Supreme Court, in a five-to-four decision, declined to extend *Robinson's* holding to circumstances where a chronic alcoholic was convicted of public intoxication, reasoning that the defendant was not convicted merely for being a chronic alcoholic but rather for being in public while drunk. That is, the State was not punishing the defendant for his mere status, but rather was imposing "a criminal sanction for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public." . . . In the plurality decision, four justices rejected the proposition set forth by four dissenting justices that it was unconstitutional to punish conduct that was " involuntary" or "occasioned by a compulsion."

The fifth justice in the *Powell* plurality, Justice White, concurred in the result only, concluding that the issue of involuntary or compulsive behavior could be pivotal to the determination of cruel and unusual punishment, but the record did not show the defendant (who had a home) suffered from any inability to refrain from drinking in public. Justice White opined that punishing a homeless alcoholic for public drunkenness could constitute unconstitutional punishment if it was impossible for the person to resist drunkenness in a public place. Relying on Justice White's concurring opinion, Kellogg argues that Justice White, who was the deciding vote in *Powell,* would have sided with the dissenting justices had the circumstances of his case (i.e., an involuntarily homeless chronic alcoholic) been presented, thus resulting in a finding of cruel and unusual punishment by a plurality of the Supreme Court.

We are not persuaded. Although in *Robinson* the U.S. Supreme Court held it was constitutionally impermissible to punish for the mere condition of addiction, the Court was careful to limit the scope of its decision by pointing out that a state may permissibly punish disorderly conduct resulting from the use of narcotics. This limitation was recognized and refined by the plurality opinion in *Powell,* where the Court held it was permissible for a state to impose criminal punishment when the addict engages in conduct that spills into public areas. . . .

Here, the reason Kellogg was subjected to misdemeanor culpability for being intoxicated in public was not because of his condition of being a homeless alcoholic but rather because of his conduct that posed a safety hazard. If Kellogg had merely been drunk in public in a manner that did not pose a safety hazard (i.e., if he were able to exercise care for his own and the public's safety and was not blocking a public way), he could not have been adjudicated guilty under section 647(f). The state has a legitimate need to control public drunkenness when such drunkenness creates a safety hazard. It would be neither safe nor humane to allow intoxicated persons to stumble into busy streets or to lie unchecked on sidewalks, driveways, parking lots, streets, and other such public areas where they could be trampled upon, tripped over, or run over by cars. The facts of Kellogg's public intoxication in the instant case show a clear potential for such harm. He was found sitting in bushes on a freeway embankment in an inebriated state. It is not difficult to imagine the serious possibility of danger to himself or others had he wandered off the embankment onto the freeway. . . .

Holding

We conclude that the California legislature's decision to allow misdemeanor culpability for public intoxication, even as applied to a homeless chronic alcoholic such as Kellogg, is neither disproportionate to the offense nor inhumane. In deciding whether punishment is unconstitutionally excessive, we consider the degree of the individual's personal culpability as compared to the amount of punishment imposed. To the extent Kellogg has no choice but to be drunk in public given the nature of his impairments, his culpability is low; however, the penal sanctions imposed on him under section 647(f) are correspondingly low. Given the state's interest in providing for the safety of its citizens, including Kellogg, imposition of low-level criminal sanctions for Kellogg's conduct does not tread on the federal or state constitutional proscriptions against cruel and/or unusual punishment.

In presenting his argument, Kellogg points to the various impediments to his ability to obtain shelter and effective treatment, apparently caused by a myriad of factors including the nature of his condition and governmental policies and resources, and asserts that these impediments do not justify criminally prosecuting him. He posits that the Eighth Amendment "mandates that society do more for [him] than prosecute him criminally and repeatedly incarcerate him for circumstances which are beyond his control." We are sympathetic to Kellogg's plight; however, we are not in a position to serve as policy maker to evaluate societal deficiencies and amelioration strategies. . . . The judgment is affirmed.

Dissenting, *McDonald, J.*

Because Kellogg is involuntarily homeless and a chronic alcoholic with a past head injury who suffers from dementia, severe cognitive impairment, and a schizoid personality disorder, and there is no evidence he was unable by reason of his intoxication to care for himself or others, other than inability inherent in intoxication, or interfered in any manner with a public way, his section 647(f) conviction solely for being intoxicated in public constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Accordingly, the trial court erred by denying Kellogg's motion to dismiss the section 647(f) charge against him. . . .

Although the people assert that incarceration of Kellogg provides him with treatment similar to or better than he would receive were he civilly committed, the quality of his treatment in jail does not prevent his

criminal conviction from constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. As Justice Fortas stated in his dissenting opinion in *Powell,*

> It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a 'revolving door'—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest. The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates. . . .

The scope of the California Constitution's prohibition of cruel or unusual punishment is not well-defined. . . . Nevertheless, the California Supreme Court has consistently followed the principle that "a sentence is cruel or unusual as applied to a particular defendant . . . [when] the punishment shocks the conscience and offends fundamental notions of human dignity." . . . In this case, the focus is on the nature of the offense and the offender in discussing whether Kellogg's public intoxication conviction is cruel or unusual punishment under article I section 17 of the California Constitution. . . .

A section 647(f) public intoxication offense, both in the abstract and as committed by Kellogg, is a nonviolent, fairly innocuous offense. . . . It is a nonviolent offense, does not require a victim, and poses little, if any, danger to society in general. As committed by Kellogg, the offense was nonviolent, victimless, and posed no danger to society. Kellogg was found intoxicated sitting under a bush in a public area. He was rocking back and forth, talking to himself, and gesturing. The record does not show that Kellogg's public intoxication posed a danger to other persons or society in general. His motive in drinking presumably was merely to fulfill his physical and psychological compulsion as an alcoholic to become intoxicated. Because Kellogg is involuntarily homeless and did not have the alternative of being intoxicated in private, he did not have any specific purpose or motive to be intoxicated in a public place. Rather, it was his only option. . . . As an involuntarily homeless person, Kellogg cannot avoid appearing in public. As a chronic alcoholic, he cannot stop drinking and being intoxicated. Therefore, Kellogg cannot avoid being intoxicated in a public place.

Based on the nature of the offense and the offender, Kellogg's section 647(f) public intoxication conviction "shocks the conscience and offends fundamental notions of human dignity," and therefore constitutes cruel or unusual punishment in violation of . . . the . . . U.S. Constitution and . . . California Constitution. I would reverse the judgment.

Questions for Discussion

1. Summarize the opinions of the U.S. Supreme Court in *Robinson v. California* and in *Powell v. Texas.*
2. Why does Kellogg argue that his arrest and incarceration constitute unconstitutional cruel and unusual punishment? How does the California court respond to this argument? What is the basis for Judge McDonald's dissent? Is the majority or the dissent more consistent with Supreme Court precedents?
3. In terms of public policy, discuss the impact of the majority decision on the criminal justice system. How would the minority decision affect public policy?

See more cases on the study site: Powell v. Texas, *www.sagepub.com/lippmanccl2e*

You Decide

4.2 The defendant Raymond Moore was arrested for possession with the intent to sell heroin and of the illegal importation of a controlled substance. He was arrested in a hotel room as he was sitting in a chair adjacent to a bed where the police found 1,854.5 milligrams of a mixture containing heroin and another pile of 1,824 milligrams of a heroin mixture on a mirror. The police also found gelatin capsules, some of which were partially filled with the heroin mixture, and a firearm. Moore had fifty capsules in his possession. He apparently had been an addict for roughly twenty-five years and claimed that he was in the room to purchase heroin for his own use.

Moore's conviction was affirmed on appeal. Judge J. Skelly Wright, in dissent, argued that the trial court had improperly refused to instruct the jury that an addict who, "by reason of his use of drugs lacks the substantial capacity to confirm his conduct to the requirements of the law may not be held criminally responsible for mere possession of drugs for his own use." Judge Wright argued that "no matter how the addict came to be addicted, once he has reached that stage he clearly is sick, and a bare desire for vengeance cannot justify his treatment as a criminal." Judge Wright also argued that holding Moore criminally liable for drug possession was contrary to the federal interest in treating and rehabilitating narcotics addicts.

How would you rule in this case? See *United States v. Moore,* 486 F.2d 1139 (D.C. Cir. 1973).

You can find the answer at www.sagepub.com/lippmanccl2e

Omissions

Can you be held criminally liable for a failure to act? For casually stepping over the body of a dying person who is blocking the entrance to your favorite coffee shop? The Model Penal Code, as we have seen, requires that criminal conduct be based on a "voluntary act or omission to perform an act of which [an individual] is physically capable." An **omission** is a failure to act or a "negative act."

The criminal law is generally concerned with punishing individuals who engage in voluntary acts that violate the law. The law, on occasion, imposes a duty or obligation on individuals to act and punishes a failure to act. For example, we are obliged to pay taxes, register for the draft, serve on juries, and report an accident. These duties are required in the interests of society and are limited exceptions to the requirement that a crime requires a voluntary act.

The American and European Bystander Rules

The basic rule in the United States is that an individual is not legally required to assist a person who is in peril. This principle was clearly established in 1907 in *People v. Beardsley.* The Michigan Supreme Court ruled that the married Beardsley was not liable for failing to take steps to ensure the safety of Blanche Burns, a woman with whom he was spending the weekend. The court explained that the fact that Burns was in Beardsley's house at the time she overdosed on drugs and alcohol did not create a legal duty to assist her.[16] The Michigan judges cited in support of this verdict the statement of U.S. Supreme Court Justice Joseph Stephen Field that it is "undoubtedly the moral duty of every person to extend to others assistance when in danger . . . and, if such efforts should be omitted . . . he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society."[17] Chief Justice Carpenter of the New Hampshire Supreme Court earlier had recognized that an individual did not possess a duty to rescue a child standing in the path of an oncoming train. Justice Carpenter noted that "if he does not, he may . . . justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death."[18]

This so-called **American bystander rule** contrasts with the **European bystander rule** common in Europe that obligates individuals to intervene. Most Americans would likely agree that an Olympic swimmer is morally obligated to rescue a young child drowning in a swimming pool. Why then is this not recognized as a legal duty in the United States? There are several reasons for the American bystander rule:[19]

- Individuals intervening may be placed in jeopardy.
- Bystanders may misperceive a situation, unnecessarily interfere, and create needless complications.
- Individuals may lack the physical capacity and expertise to subdue an assailant or to rescue a hostage and place themselves in danger. This is the role of criminal justice professionals.
- The circumstances under which individuals should intervene and the acts required to satisfy the obligation to assist another would be difficult to clearly define.
- Criminal prosecutions for a failure to intervene would burden the criminal justice system.
- Individuals in a capitalist society are responsible for their own welfare and should not expect assistance from others.
- Most people will assist others out of a sense of moral responsibility, and there is no need for the law to require intervention.

Critics of the American bystander rule contend that there is little difference between pushing a child onto the railroad tracks and failing to intervene to ensure the child's safety and that criminal liability should extend to both acts and omissions. This also would deter crime, because offenders may be reluctant to commit crimes in situations in which they anticipate that citizens will intervene. We can see how the readiness of passengers to confront terrorists on airplanes has prevented several attacks, most notably in the case of the "shoe bomber" Richard Reed. The Good Samaritan rule also assists in promoting a sense of community and regard for others.[20]

The conflict between law and morality was starkly presented in 1964 when thirty-eight residents of New York City were awakened by the desperate screams of Kitty Genovese, a

twenty-eight-year-old woman returning home from work. Kitty parked her car in a lot roughly one hundred feet from her apartment and was confronted by Winston Moseley, a married father of two young children, who later would testify that he received emotional gratification from stalking women. The thirty-eight residents of the building turned on their lights and opened their windows and watched as Moseley returned on three separate occasions over a period of thirty-five minutes to stab Kitty seventeen times. The third time Moseley returned, he found that Kitty had crawled to safety inside a nearby apartment house, and he stabbed her in the throat to prevent her from screaming, attempted to rape her, and took $49 from her wallet. One person found the courage to persuade a neighbor to call the police, who arrived in two minutes to find Kitty's dead body. This event profoundly impacted America. Commentators asked whether we had become a society of passive bystanders who only were concerned with our own welfare.[21]

The Duty to Intervene

American criminal law does not impose a general duty on the individuals witnessing the murder of Kitty Genovese to intervene. There is a duty, however, to assist another under certain limited conditions.[22] The primary requirement is that a duty must be recognized under either the common law or a statute.

- *Status*. The common law recognized that individuals possess an obligation to assist their child, spouse, or employee. In *State v. Mally,* the defendant was convicted of "hastening" the death of his wife who had fallen and broken both of her arms, precipitating severe shock and the degeneration of her kidneys. Michael Mally left his wife Kay alone in bed for two days, only bothering to provide her with a single glass of water. A Montana district court held that "the failure to obtain medical aid for one who is owed a duty is a sufficient degree of negligence to constitute involuntary manslaughter provided death results from the failure to act."[23]
- *Statute*. A **duty to intervene** may be created by a statute that imposes a duty of care. This may be a criminal statute requiring that a doctor report child abuse or a statute that sets forth the obligations of parents. In *Craig v. State,* the defendants followed the dictates of their religion and treated their child's fatal illness with prayer rather than medicine and were subsequently convicted of failing to obtain medical care for their now-deceased six-year-old daughter. The court ruled that the parents had breached their duty under a statute that provided that a father and mother are jointly and individually responsible for the "support, care, nurture, welfare and education of their minor children." The statute failed to mention medical care, but the court had "no hesitancy in holding that it is embraced within the scope of the broad language used."[24]
- *Contract*. An obligation may be created by an agreement. An obvious example is a babysitter who agrees to care for children or a lifeguard employed to safeguard swimmers. In *Commonwealth v. Pestinikas,* Walter and Helen Pestinikas verbally agreed to provide shelter, food, and medicine to ninety-two-year-old Joseph Kly, who had been hospitalized with a severe weakness of the esophagus. Kly agreed to pay the Pestinikas $300 a month in return for food, shelter, care, and medicine. Kly was found dead of dehydration and starvation roughly nineteen months later. A Pennsylvania superior court ruled that although failure to provide food and medicine could not have been the basis for prosecuting a stranger who learned of Kly's condition, a "duty to act imposed by contract is legally enforceable and, therefore, creates a legal duty."[25]
- *Assumption of a Duty.* An individual who voluntarily intervenes to assist another is charged with a duty of care. In *People v. Oliver,* Oliver, knowing that Cornejo was extremely drunk, drove him from a bar to Oliver's home, where she assisted him to inject drugs. Cornejo collapsed on the floor, and Oliver instructed her daughter to drag Cornejo's body outside and hide him behind a shed. The next morning Cornejo was discovered dead. A California superior court ruled that by taking Cornejo into her home, Oliver "took charge of a person unable to prevent harm to himself," and she "owed Cornejo a duty" that she breached by failing to summon medical assistance.[26]
- *Creation of Peril*. An individual who intentionally or negligently places another in danger has a duty of rescue. In *Jones v. State,* the defendant raped a twelve-year-old girl who almost immediately jumped or fell off a bridge into a stream. The defendant waded into the water, but neglected to rescue the young woman. The court asked, "Can it be doubted that one

who by his own overpowering criminal act has put another in danger of drowning has the duty to preserve her life?"[27]

- *Control.* An individual has a duty to direct and to care for those under his or her supervision and command, including employees or members of the military. A California criminal statute provides that parents or legal guardians of any person under eighteen "shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child."[28] The California Supreme Court noted that this act was part of an effort to combat gangs and that the law applies to parents who intentionally or with criminal negligence fail to fulfill their duty to control their child and, as a result, contribute to child delinquency.[29]
- *Property Owner.* Property owners owe a duty of care to those invited onto their land. The defendants, in *Commonwealth v. Karetny,* operated a nightclub on a pier in Philadelphia, knowing that the pier was in imminent danger of collapse. The pier subsequently collapsed, killing three persons, and the Pennsylvania Supreme Court held that there was sufficient evidence to warrant a jury in finding the appellees' "reckless creation of a risk of catastrophe."[30]

In addition to establishing a duty, the prosecutor must demonstrate a number of other facts beyond a reasonable doubt:

- *Possession of Knowledge of the Peril.* The prosecution must establish that an individual was actually aware or should have been aware that another person was in danger. A mother cannot be held liable for her boyfriend's molestation of her child unless she knew or ought to have known that her child was being sexually mistreated.[31]
- *Acted With the Required Intent.* Most omission cases involve death and are prosecuted as either murder or manslaughter (reckless disregard).[32] As we will see in Chapter 11, homicide requires a specific intent to kill, while manslaughter requires knowledge that death is substantially certain to result. Poor judgment, a reasonable mistake, or a debatable decision is generally not sufficient to establish criminal guilt.[33]
- *Caused the Harm to the Victim.* The defendant's failure to assist the victim must have caused the harm.[34]

We can see the interrelationship between these three factors in *Craig v. State*. In *Craig, two parents* were not held to be *grossly negligent* in causing their daughter's death because they were not found to have possessed *knowledge* of her serious illness, which was not apparent until two or three days prior to her death. The evidence indicated at this point that medical assistance would not have saved her life. As a result, the parents *were not held to have caused* the child's death.[35]

Last, individuals are not expected to "accomplish the impossible." *The law excuses persons from fulfilling their duty in those instances in which they would be placed in peril.* Individuals, however, must take whatever action is feasible under the circumstances. In *State v. Walden,* the defendant observed the beating of her infant son by his biological father. The North Carolina Supreme Court recognized that parents cannot be expected or required to exhibit unreasonable courage and heroism in protecting their children. However, the defendant was convicted based on the fact that she neglected to take every reasonable step under the circumstances to avert the harm, such as protesting, alerting authorities, or seeking assistance.[36]

In serious cases of family abuse, duty, knowledge, intent, causality, and a failure to intervene are easily established. In *Burton,* the defendants Sharon Burton and Leroy Locke were convicted of first-degree murder. On January 22, 1996, Sharon Burton passively watched Leroy Locke chase her daughter Dominique with a belt after learning that she had a "toilet training accident" on the carpet while shouting "the little bitch pissed again." Locke then filled the bathtub with water and forced Dominique's head under the water three times for fifteen seconds at a time. Dominique's body reportedly went limp in the water, and Locke and Burton left the three-year-old unattended in the bathtub for thirty minutes while they played cards. Burton, after discovering Dominique's lifeless body, called her mother rather than authorities and later falsely reported to investigators that the child had fallen off the toilet. An Illinois appellate court found that Burton possessed knowledge that Dominique was being subjected to an ongoing pattern of abuse and that there was a substantial likelihood that Dominique would suffer death or great bodily harm.[37]

The next case in the textbook, *Jones v. United States,* challenges you to determine whether the defendant possessed a duty of care to the children in her home.

The Statutory Standard

A Vermont **good Samaritan statute** requires individuals to provide reasonable medical assistance and, in return, relieves individuals of liability for civil damages unless their actions constitute gross negligence. Willful violation of the statute is punishable by a fine of not more than $100. This has the advantage of focusing on medical assistance and of not requiring individuals to intervene to prevent harm or to rescue individuals. Most state Good Samaritan laws do not require individuals to intervene, although people who do intervene are provided some degree of protection from civil liability.

Vermont Statutes Annotated Title 12, Chapter 23, § 519. Emergency Medical Care

> A person who knows another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

A Wisconsin statute is much less demanding and makes it a misdemeanor for any person to fail to summon or to provide assistance.

Wisconsin Laws 940.34. Duty to Aid Endangered Crime Victim

(1) . . .

(2) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim. A person need not comply with this subsection if any of the following apply:

(a) Compliance would place him or her in danger.
(b) Compliance would interfere with duties the person owes to others.
(c) Assistance is being summoned or provided by others.

A Rhode Island law requires individuals to provide reasonable assistance to an individual who is exposed to, or who has suffered, grave physical harm.

Rhode Island Public Laws Section 11–56–1. Duty to Render Assistance

> Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term of not exceeding six (6) months, or by a fine of not more than five hundred dollars ($500), or both.

Consider the advisability of such statutes in light of the reasons behind the American bystander rule. Compare these statutes to the broad language of the *German criminal code:*

Section 330c. Failure to Render Aid

> Anybody who does not render aid in an accident or common danger or in an emergency situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger, or if he would not thereby violate other important duties, shall be punished by imprisonment for a term not to exceed one year or a fine.

Model Penal Code

Section 2.01. Requirement of a Voluntary Act, Omission as Basis of Liability

(1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) . . .

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
(a) the omission is expressly made sufficient by the law defining the offense; or
(b) a duty to perform the omitted act is otherwise imposed by law.

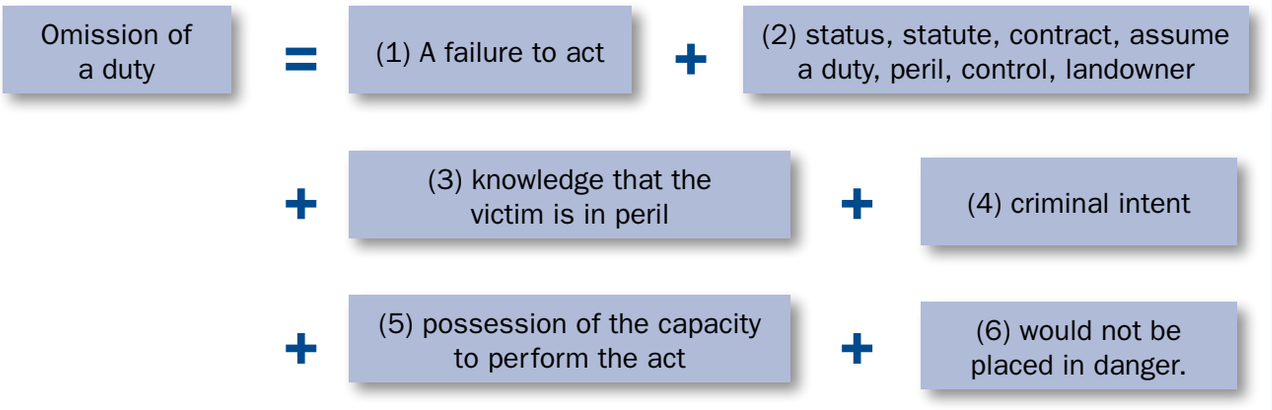
Analysis

The Model Penal Code adopts the conventional position and does not generally impose criminal liability for omissions.

Section (1) excuses an individual from liability when the intervention is beyond his or her physical capacities or would place him or her in peril.

Section (3)(a) recognizes that the definition of some crimes requires an omission. This would encompass a doctor who fails to fulfill the duty to report child abuse. Section (3)(b) provides that an omission may be committed by a failure to fulfill a legal duty. This may arise from statute or the common law. A duty, however, may not arise under a moral or religious code.

The Legal Equation



Did the appellant breach a legal duty to Robert Lee Green and Anthony Lee Green?

Jones v. United States, *308 F.2D 307 (U.S. APP. D.C. 1962), Opinion by: Wright, J.*

Appellant, together with one Shirley Green, was tried on a three-count indictment charging them jointly with (1) abusing and maltreating Robert Lee Green (2), abusing and maltreating Anthony Lee Green, and (3) involuntary manslaughter through failure to perform their legal duty of care for Anthony Lee Green, which failure resulted in his death. At the close of evidence, after a trial before a jury, the first two counts were dismissed as to both defendants. On the third count, appellant was convicted of involuntary manslaughter. Shirley Green was found not guilty.

Appellant argues that there was insufficient evidence as a matter of law to warrant a jury finding of breach of duty in the care she rendered Anthony Lee. Alternatively, appellant argues that the trial court committed plain error in failing to instruct the jury that it must first find that appellant was under a legal obligation to provide food

and necessities to Anthony Lee before finding her guilty of manslaughter in failing to provide them. The first argument is without merit. Upon the latter we reverse.

Facts

A summary of the evidence, which is in conflict upon almost every significant issue, is necessary for the disposition of both arguments. In late 1957, Shirley Green became pregnant, out of wedlock, with a child, Robert Lee, subsequently born August 17, 1958. Apparently to avoid the embarrassment of the presence of the child in the Green home, it was arranged that appellant, a family friend, would take the child to her home after birth. Appellant did so, and the child remained there continuously until removed by the police on August 5, 1960. Initially appellant made some motions toward the adoption of Robert Lee, but these came to naught, and shortly thereafter it was agreed that Shirley Green was to pay appellant $72 a month for his care. According to appellant, these payments were made for only five months. According to Shirley Green, they were made up to July 1960.

Early in 1959 Shirley Green again became pregnant, this time with the child Anthony Lee, whose death is the basis of appellant's conviction. This child was born October 21, 1959. Soon after birth, Anthony Lee developed a mild jaundice condition . . . The jaundice resulted in his retention in the hospital for three days beyond the usual time, or until October 26, 1959, when, on authorization signed by Shirley Green, Anthony Lee was released by the hospital to appellant's custody. Shirley Green, after a two or three day stay in the hospital, also lived with appellant for three weeks, after which she returned to her parents' home, leaving the children with appellant. She testified she did not see them again, except for one visit in March, until August 5, 1960. Consequently, though there does not seem to have been any specific monetary agreement with Shirley Green covering Anthony Lee's support, appellant had complete custody of both children until they were rescued by the police.

With regard to medical care, the evidence is undisputed. In March 1960, appellant called a Dr. Turner to her home to treat Anthony Lee for a bronchial condition. Appellant also telephoned the doctor at various times to consult with him concerning Anthony Lee's diet and health. In early July 1960, appellant took Anthony Lee to Dr. Turner's office where he was treated for "simple diarrhea." At this time the doctor noted the "wizened" appearance of the child and told appellant to tell the mother of the child that he should be taken to a hospital. This was not done.

On August 2, 1960, two collectors for the local gas company had occasion to go to the basement of appellant's home, and there saw the two children. Robert Lee and Anthony Lee at this time were age two years and ten months respectively. Robert Lee was in a "crib" consisting of a framework of wood, covered with a fine wire screening, including the top which was hinged. The "crib" was lined with newspaper, which was stained, apparently with feces, and crawling with roaches. Anthony Lee was lying in a bassinet and was described as having the appearance of a "small baby monkey." One collector testified to seeing roaches on Anthony Lee.

On August 5, 1960, the collectors returned to appellant's home in the company of several police officers and personnel of the Women's Bureau. At this time, Anthony Lee was upstairs in the dining room in the bassinet, but Robert Lee was still downstairs in his "crib." The officers removed the children to the D.C. General Hospital, where Anthony Lee was diagnosed as suffering from severe malnutrition and lesions over large portions of his body, apparently caused by severe diaper rash. Following admission, he was fed repeatedly, apparently with no difficulty, and was described as being very hungry. His death, thirty-four hours after admission, was attributed without dispute to malnutrition. At birth, Anthony Lee weighed six pounds, fifteen ounces—at death at age ten months, he weighed seven pounds, thirteen ounces. Normal weight at this age would have been approximately fourteen pounds.

Appellant argues that nothing in the evidence establishes that she failed to provide food to Anthony Lee. She cites her own testimony and the testimony of a lodger, Mr. Wills, that she did in fact feed the baby regularly. At trial, the defense made repeated attempts to extract from the medical witnesses opinions that the jaundice, or the condition that caused it, might have prevented the baby from assimilating food. The doctors conceded this was possible but not probable, since the autopsy revealed no condition that would support the defense theory. It was also shown by the disinterested medical witnesses that the child had no difficulty in ingesting food immediately after birth, and that Anthony Lee, in the last hours before his death, was able to take several bottles, apparently without difficulty, and seemed very hungry. This evidence, combined with the absence of any physical cause for nonassimilation, taken in the context of the condition in which these children were kept, presents a jury question on the feeding issue.

Moreover, there is substantial evidence from which the jury could have found that appellant failed to obtain proper medical care for the child. Appellant relies upon the evidence showing that on one occasion she summoned a doctor for the child, on another took the child to the doctor's office, and that she telephoned the doctor on several occasions about the baby's formula. However, the last time a doctor saw the child was a month before his death, and appellant admitted that on that occasion the doctor recommended hospitalization. Appellant did not hospitalize the child, nor did she take any other steps to obtain medical care in the last crucial month. Thus there was sufficient evidence to go to the jury on the issue of medical care, as well as failure to feed.

Issue

Appellant takes exception to the failure of the trial court to charge that the jury must find beyond a reasonable

doubt, as an element of the crime, that appellant was under a legal duty to supply food and necessities to Anthony Lee. . . .

Reasoning

The problem of establishing the duty to take action that would preserve the life of another has not often arisen in the case law of this country. The most commonly cited statement of the rule is found *in People v. Beardlsey,* 150 Mich. 206, 113 N.W. 1128, 1129 (1962), which provides that the

> law recognizes that . . . the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. . . . It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death.

There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

It is the contention of the government that either the third or the fourth ground is applicable here. However, it is obvious that in any of the four situations, there are critical issues of fact that must be passed on by the jury—specifically in this case, whether appellant had entered into a contract with the mother for the care of Anthony Lee or, alternatively, whether she assumed the care of the child and secluded him from the care of his mother, his natural protector. On both of these issues, the evidence is in direct conflict, appellant insisting that the mother was actually living with appellant and Anthony Lee, and hence should have been taking care of the child herself, while Shirley Green testified she was living with her parents and was paying appellant to care for both children.

Holding

In spite of this conflict, the instructions given in the case failed even to suggest the necessity for finding a legal duty of care. The only reference to duty in the instructions was the reading of the indictment, which charged, inter alia, that the defendants "failed to perform their legal duty." A finding of legal duty is the critical element of the crime charged, and failure to instruct the jury concerning it was plain error.

Reversed and remanded.

Questions for Discussion

1. Why was this case remanded to the trial court?
2. Did both Jones and Shirley Green breach a duty of care?
3. Would you acquit Jones in the event that she informed Shirley Green that she no longer desired to take care of Robert and Anthony, and Shirley Green made no effort to remove the children from Jones's home?
4. Is it significant that Jones did not call Shirley Green as suggested by the doctor? Did the doctor breach a duty in this case?
5. What if Shirley Green left Anthony on Ms. Jones's porch with a note asking Ms. Jones to care for him, and Ms. Jones ignored Anthony? In the event that Anthony froze to death, would both Green and Jones be criminally liable?

Cases and Comments

1. ***Broadening the Parental Duty of Care.*** Defendants Darryl Stephens and Yvette Green lived together for eleven years. Eight of the ten children in their household were the product of their relationship. In November 1996, Yvette was named legal guardian of eight-year-old Sabrina Green, the daughter of Yvette's deceased, crack-addicted sister. Yvette did not continue the medication Sabrina required to control her oppositional defiant disorder. Sabrina was punished almost daily as a result of her tantrums, fights with other children, refusal to follow household rules, and bed wetting. The defendants resorted to tying Sabrina to her bed and making her sit in the hallway where she could be monitored. They disregarded the pleas of the other children to seek medical care for Sabrina. A week prior to Sabrina's death, Stephens was seen hitting her with a belt ten or twelve times. At the time of Sabrina's death in November 1997, the autopsy indicated that she suffered from a hemorrhage caused by numerous blunt impacts to the head, a third-degree burn to the hand that was left untreated until infection and gangrene set in, pneumonia, bruises that were consistent with being hit with a belt, scars from her hands being tied with a rope, and bedsores from being immobilized for many days. The injuries to her right hand were found to be consistent with being slammed by the refrigerator door as punishment for Sabrina's taking food without permission. The injuries to her head resulted from a heavy instrument, such as a baseball bat.

The prosecution's case was based on two alternative theories. The first theory was that Stephens acted together

with Yvette to engage in reckless conduct that created a grave risk of serious physical injury or death to Sabrina that resulted in her death. The New York court had little difficulty in finding that this was supported by the evidence. The second approach, that Stephens failed to fulfill his duty to secure medical care for Sabrina, was more difficult to establish. Stephens argued that he did not possess either a family or guardian relationship with Sabrina and was merely a live-in boyfriend who did not possess a legal duty to ensure that she received the necessary medical care. In fact, in *People v. Meyers,* 608 N.Y.S.2d 544 (N.Y. S. Ct. 1994), a New York court refused to utilize the *in loco parentis* doctrine (which refers to an individual who assumes a parental role in the absence of a parent) to impose liability on a defendant charged with the negligent murder of a two-month-old child who died of severe dehydration and malnutrition. The defendant was the live-in boyfriend of the child's mother and had limited his involvement to contributing to the household finances, babysitting, and the occasional purchase of formula. The judges in *Meyers* concluded that the defendant had not intended to assume responsibility for the child's welfare.

The appellate court in *Stephens,* however, distinguished this case from *Meyers* and ruled that the *in loco parentis* doctrine imposed a duty on Stephens based on his having undertaken the "fundamental responsibilities that are normally those of a parent." He was determined to have taken joint responsibility for Sabrina's housing, clothing, food, and supervision and treated her with the same degree of concern as he treated the other children in the household. The court thus concluded that the evidence indicated that at the time of Sabrina's death, Stephens was responsible for Sabrina's care and that, together with Yvette, he recklessly engaged in conduct that created a grave risk of serious physical injury or death. See *People v. Stephens* (2003 WL 22970956, N.Y.a.d. 1 Dept., 2003).

In *State v. Miranda,* the Connecticut Supreme Court recognized the doctrine of *in loco parentis* and observed that the United States was experiencing a significant increase in nontraditional alternative family arrangements. The court observed that the obligation of caretakers to safeguard children should not depend upon whether the adults had entered into a formal marital relationship. See *State v. Miranda* 715 A.2d 680 (Conn. 1998).

What factors are most important in establishing that an individual is acting *in loco parentis?* Should a live-in boyfriend or girlfriend who occasionally cares for an infant be exempted from a duty of care? Is there a danger that individuals will unfairly be held criminally liable as the duty to intervene is broadened?

2. ***Self-Defense.*** In April 1998, Bonnie Kuntz returned to the mobile home she shared with her boyfriend Warren Becker. The two had been fighting. Kuntz found the house in disarray and upon entering the kitchen she immediately was attacked by Becker. Kuntz recalled pushing Becker away and fleeing from the mobile home. She returned after regaining her composure to find Becker dead from a stab wound. Kuntz alleged that she then took Becker's car keys, drove to a friend's house, and called her mother. Kuntz's sister-in-law alerted authorities roughly an hour following the stabbing. The Montana Supreme Court ruled that the notion that a duty should be limited to spouses was "outdated" and that Kuntz and Becker had established a "personal relationship" that created the same duty as existed between married couples. At any rate, the supreme court remanded the case for further proceedings and determined that the legal duty based on the creation of peril extended to an individual such as Kuntz, who harmed another in self-defense. Kuntz thus was properly charged and could be prosecuted for negligent homicide based on her having stabbed Becker and then having failed to provide for immediate assistance or calling for medical assistance.

The Montana Supreme Court provided direction to the lower court on how to instruct the jury on the duty of care owed by Kuntz to Becker. The court ruled that an individual who resorts to self-defense against an aggressor has no duty to assist her aggressor in the event that this may conceivably create a risk of bodily injury or death to herself or to other persons. She need not endanger herself by checking the pulse of the attacker or calling the police before retreating to safety. The victim's primary duty after fending off an attack is to seek and secure protection. Last, the duty to summon assistance may be revived after the individual has fully reached a point of safety. This duty may be relieved as a result of fear, shock, or injury. The failure to summon assistance must also be the cause of the perpetrator's death.

Dissenting Justice Terry N. Trieweiler criticized the decision, noting that the supreme court was both holding that Kuntz may have acted justifiably in defending herself and, at the same time, that she may have possessed a duty of care toward Becker, a wrongdoer who precipitated the altercation. Justice Trieweiler accordingly would hold that an individual who is attacked by another and reasonably believes that deadly force is necessary to prevent imminent death or serious bodily injury and therefore uses deadly force to defend herself has no duty to summon assistance for her assailant.

What is your opinion on this issue? See *State ex rel. Kuntz v. Montana, Thirteenth Judicial Dist. Court*, 995 P.2d 951 (Mont. 2000).

3. ***The Free Exercise of Religion and the Duty of Care to a Child.*** On the morning of July 19, 1989, Michael and Zelia McCauley brought their eight-year-old daughter, Elisha, to the hospital. Tests revealed leukemia. The results indicated that Elisha had a hematocrit reading (percentage of red to whole blood) of fourteen and a half percent. A normal hematocrit for a young child is roughly forty percent. Further laboratory tests disclosed the presence of other symptoms consistent with the diagnosis of leukemia. The doctors determined that a bone marrow procedure was required in order to confirm the diagnosis. They, however, were unwilling to perform the operation until they raised Elisha's hematocrit to a safe clinical range in order to eliminate the risk of congestive heart failure. The only treatment available to raise the red blood cell level was through a blood transfusion.

The doctors explained that in the event that the diagnosis was confirmed, the leukemia would be treated with chemotherapy and blood transfusions.

Michael and Zelia McCauley are Jehovah's Witnesses. They were baptized over fifteen years prior and attend services three days a week. A principal tenet of their religion is the belief based on an interpretation of the Bible that the reception of blood or blood products precludes resurrection and everlasting life after death. They accordingly refused to consent to the administration of blood or blood products to Elisha. The McCauleys do not object to other medical procedures.

The Massachusetts Supreme Court recognized that the free exercise of religion is a fundamental right protected under the First Amendment to the U.S. Constitution and that it includes the right of parents to raise their children in accordance with the tenets of their religion. The court, however, ruled that this religious interest is not absolute and must give way to the State's concern with the protecting the welfare and life of children and in maintaining the medical profession's ethical commitment to the care and preservation of life. The tests that the doctors desire to undertake will identify the type of leukemia involved and enable doctors to determine the required chemotherapy. Absent these procedures, Elisha likely will die. The supreme court recognized the sincerity of the McCauleys' belief, but concluded that Elisha's "best interests and welfare, coupled with the strong interest of the State, must outweigh her parents' objections to the blood transfusions."

Do you agree with this decision? See *Matter of McCauley,* 565 N.E.2d 411 (Mass. 1991).

Now consider the 1972 U.S. Supreme Court decision in *Wisconsin v. Yoder*. Members of the Old Order Amish religion and the Conservative Amish Mennonite Church were convicted of violating Wisconsin's compulsory school-attendance law by declining to send their children to public or private schools beyond the eighth grade. Wisconsin law requires school attendance until the age of sixteen; the Amish contend that the law violates their free exercise of religion.

The Amish recognize that children must master basic math, reading, and writing and develop a familiarity with the "outside world." They contend that education beyond the eighth grade exposes their children to "worldly values" and, more importantly, that the children must be integrated into a communal and agrarian lifestyle and inculcated with attitudes favoring manual work, self-reliance, community welfare, and a life of faith and goodness. This reflects the biblical injunction from the Epistle of Paul to the Romans, "Be not conformed to this world. . . ." The Amish have protected and preserved their "simple and uncomplicated" communities in the United States for roughly 200 years.

The Supreme Court pronounced that Wisconsin must articulate an interest of "the highest order" to overcome a claim of the free exercise of religion. Wisconsin claims that the system of compulsory education is essential to train citizens to participate in politics and to be productive members of the economy. The Supreme Court ruled in favor of the Amish, noting that the qualities of reliability, self-reliance, and dedication to work are highly valued in the general economy and that the Amish are fully capable of fulfilling their democratic responsibilities.

Why did the U.S. Supreme Court uphold the parents' free exercise of religion in *Yoder* and the Massachusetts Supreme Court rule to limit the same constitutional right in *McCauley?* Thirty states at present recognize that a parent's religious belief constitutes a criminal defense to various types of offenses. See *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

You Decide

4.3 In May 1997, nineteen-year-old Jeremy Strohmeyer together with his friend David Cash played video games at a Las Vegas casino while Strohmeyer's father gambled. Seven-year-old Sherrice Iverson threw a wet paper towel at Strohmeyer and a paper towel fight ensued. He followed her into the restroom to continue the game. The forty-six-pound Iverson threw a yellow floor sign at Strohmeyer and then began screaming. Strohmeyer covered her mouth and forced her into a bathroom stall. David Cash wandered into the restroom to look for Strohmeyer. He peered over the stall and viewed Strohmeyer gripping and threatening to kill Sherrice. Cash allegedly made an unsuccessful effort to get Strohmeyer's attention and left the bathroom. Strohmeyer then molested Sherrice and strangled her to suffocate the screams. As he was about to leave, Strohmeyer decided to relieve Sherrice's suffering and twisted her head and broke her neck. He placed the limp body in a sitting position on the toilet with Sherrice's feet in the bowl.

Strohmeyer confessed to Cash and after being apprehended by the police three days later explained that he wanted to experience death. His lawyer argued that Strohmeyer was in a "dream-like state" as a result of a combination of alcohol, drugs, and stress. In order to avoid the death penalty, Strohmeyer pled guilty to first-degree murder, first-degree kidnapping, and to the sexual assault of a minor, all of which carry a life sentence in Nevada.

Iverson's mother called for Cash to be criminally charged, but Nevada law neither required him to intervene nor to report the crime to the police. The administration at the University of California at Berkeley responded to a student demonstration calling for Cash's dismissal by explaining that there were no grounds to expel him from the institution because he had not committed a crime. Cash, who was studying nuclear engineering, refused to express remorse, explaining that he was concerned about himself and was not going to become upset over other people's problems, particularly a little girl whom he did not know.

Should David Cash be held criminally liable for a failure to rescue Sherrice Iverson? See Joshua Dressler, *Cases and Materials on Criminal Law,* 3rd ed. (St. Paul, MN: West Publishing Co., 2003), pp. 133–134.

You can find the answer at www.sagepub.com/lippmanccl2e

Possession

For an international perspective on this topic, visit the study site.

Possession is a **preparatory offense**. The thinking is that punishing possession deters and prevents the next step—a burglary, sale of narcotics, or the use of a weapon in a robbery. The possession of contraband such as drugs and guns may also provoke conflict and violence.[38]

How does the possession of contraband meet the requirement that a crime involve a voluntary act or omission? This difficulty is overcome by requiring proof that the accused knowingly obtained or received the contraband (a voluntary act) or failed to immediately dispose of the property (failure to fulfill a duty).[39]

The challenge in the crime of possession is to balance the competing values of punishing the guilty while at the same time protecting the innocent. There is little difficulty in convicting an individual who is found to have drugs in his or her pocket. Complications are created when drugs are discovered in the glove compartment of a car or in the living room of a house with four occupants. There is a temptation to charge all four with drug possession. On the other hand, there is the risk that individuals who had no knowledge of the contraband will be convicted.

Possession is typically defined as the ability to exercise "dominion and control over an object." This means that a drug dealer has the ability to move, sell, or transfer the contraband. There are several other central concepts to keep in mind.

- ***Actual possession*** refers to drugs and other contraband within an individual's physical possession or immediate reach.
- ***Constructive possession*** refers to contraband that is outside of an individual's actual physical control but over which he or she exercises control through access to the location where the contraband is stored or through ability to control an individual who has physical control over the contraband. A drug dealer has constructive possession over narcotics stored in his or her home or under the physical control of a member of his or her gang.
- ***Joint possession*** refers to a situation in which a number of individuals exercise control over contraband. Several members of a gang may all live in the home where drugs are stored. There must be specific proof connecting each individual to the drugs. The fact that a gang member lives in the house is not sufficient.
- ***Knowing possession*** refers to an individual's awareness that he or she is in possession of contraband. A drug dealer, for instance, is aware that marijuana is in his or her pocket.
- ***Mere possession*** refers to physical control without awareness of contraband. An individual may be paid by a drug dealer to carry a suitcase across international borders and lack awareness that the luggage contains drugs.

Criminal statutes punishing possession are typically interpreted to require that an individual (1) know of the presence of the item, (2) exercise actual or constructive possession, and (3) know the general character of the material. There may be individual or joint possession. An individual is required to know that the material is contraband but is not required to know the precise type of contraband involved.[40]

Hawkins v. State is an example of conviction for actual possession of a firearm by a felon. The case illustrates how courts use circumstantial, or indirect, evidence to find possession. The defendant was apprehended following a high-speed chase, and the police seized a loaded shotgun in the back seat within reach of the driver. The Texas District Court stated that possession is a voluntary act if the possessor "knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control." The court concluded that the prosecution affirmatively established Hawkins's knowledge and control over the firearm. The gun was in plain view in the back seat and was within easy reach, and Hawkins was the sole occupant of the vehicle. His guilty state of mind was indicated by his effort to escape.[41]

The **fleeting possession** rule is a limited exception to criminal possession. This permits an innocent individual to momentarily possess and dispose of an illegal object. In *People v. Mijares,* the defendant removed and disposed of narcotics that he took from an unconscious friend whom he was driving to the hospital. The California District Court, citing a fleeing possession exception, ruled that to hold Mijares liable would "result in manifest injustice to admittedly innocent individuals."[42]

The concept of constructive possession is illustrated by the federal appellate court decision in *United States v. Byfield*. Byfield traveled from New York to Washington, D.C., with a young female

who carried a tote bag. The two separated after arriving at the train station, and Byfield was alleged to have directed her movements through hand signals. The police detained and searched the young woman's bag and found that it contained men's clothing in Byfield's size and a shoe box for the brand of athletic shoes worn by Byfield, along with sixty grams of crack cocaine.

Byfield carried no luggage and yet, when questioned by the police, explained that he planned to stay in Washington, D.C., for several days. The appellate court affirmed that there was sufficient evidence establishing that Byfield had previous contact with the young woman in New York and that Byfield possessed "some stake," "power," and "dominion and control" over the crack cocaine either personally or through his female companion. The court noted that it was not unusual for juveniles to be employed as drug couriers.[43]

For a deeper look at this topic, visit the study site.

The most difficult issue for courts undoubtedly is joint possession. For example, the police searched an apartment shared by Jason Stansbury, Crisee Moore, and Anthony Webb and discovered marijuana. Only Moore and his son were present at the time. Webb arrived during the course of the search. The police seized $336 from Webb; he explained that he had been paid for babysitting Moore's son. The officers were justifiably suspicious of Webb's explanation, because he had earlier pled guilty to possession of drugs found in another apartment that he had shared with Moore. The Iowa Supreme Court ruled that where an accused such as Webb is not the only person occupying the apartment, but one of several individuals in joint possession, the knowledge and ability to maintain control over narcotics must be demonstrated by direct proof. The fact that Webb occupied the apartment was insufficient to establish possession absent additional evidence. There were no fingerprints linking Webb to the narcotics, drug paraphernalia, or firearms or bullets found on the premises, and none of these items were near or among Webb's personal belongings or in a location subject to Webb's exclusive control. A search of Webb failed to find drugs on his person, and there was no evidence that he was under the influence of narcotics.[44]

Webb starkly presents the conflict between broadly interpreting possession in order to combat narcotics traffic and the due process requirement that possession should be established beyond a reasonable doubt. Courts are clearly concerned that the "war on drugs" and "war on terrorism" will result in the conviction of individuals who have not been clearly demonstrated to have exercised control over contraband. On the other hand, requiring an unrealistic standard of proof can result in the guilty escaping criminal liability.

We should note that although Washington and North Dakota do not require knowing possession, in practice these courts have imposed a knowledge requirement to ensure fair results.[45] The importance of the knowledge requirement is illustrated by the Maryland case of *Dawkins v. State*. Dawkins was arrested in a hotel room in which the police found a tote bag containing narcotics paraphernalia and a bottle cap containing heroin residue. He claimed that the bag belonged to his girlfriend, who had asked him to carry the bag to her hotel room. Dawkins claimed to have had no idea what was in the bag and explained that he only arrived a few minutes before the police. The Maryland Supreme Court reversed the defendant's conviction and explained that in order to be guilty of possession of a controlled substance, the accused "must know of both the presence and . . . general character or illicit nature of the substance. Of course, such knowledge may be proven by circumstantial evidence, and by inferences. . . ."[46]

Model Penal Code

Section 2.01 Possession as an Act

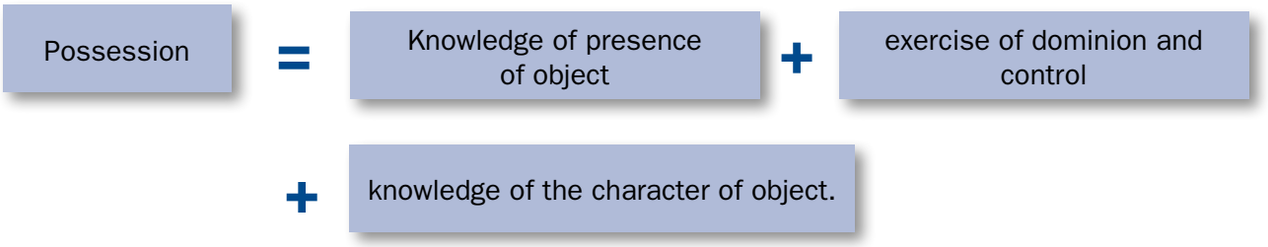
(1) . . .

(2) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Analysis

The Model Penal Code establishes that the voluntary procurement of contraband or knowing possession of contraband for a "sufficient period" satisfies the standard for possession. The code also clarifies that an individual is required only to be aware of the nature (e.g., drugs) of an item in his or her possession and need not be informed of the item's illegal character.

The Legal Equation



Did Toups have constructive possession of the cocaine?

State v. Toups, *833 So. 2d 920 (La. 2002),* Opinion by: Victory, J.

Facts

After receiving confidential information that a person named Stan was selling drugs from a residence at 633 North Scott Street and conducting a controlled purchase of drugs from that address on the afternoon of October 18, 1999, on that evening, New Orleans Police Department Officer Dennis Bush and five other officers executed a search warrant at that residence. Before executing the warrant, the officers conducted a surveillance of the residence for approximately thirty minutes. After receiving no response at the front door, Bush entered the . . . residence. He observed defendant Mary Toups and Stanley Williams, the known resident of that address, seated on a sofa in the front living room, facing one another and apparently engaged in conversation. Two pieces of crack cocaine, three clear glass crack pipes, and a razor blade were found on a coffee table positioned directly in front of defendant and Williams. Defendant was approximately three feet from the drugs on the table, which was directly in front of her. Another sixteen rocks of cocaine found at the home were located in a plastic container that was next to Williams. Police also seized $304 in cash from the same area.

The officers did not see defendant or Williams smoking from the pipes. The officers did not see defendant enter the residence during their thirty-minute surveillance, indicating she was in the residence for at least that long, but they were unable to find any indication that defendant resided there. Defendant falsely gave her name as "Mary Billiot" at the time of her arrest. While defendant was not charged with any offense with regard to the cocaine in the container, the State filed a bill of information charging defendant with possession of the two pieces of cocaine found on the coffee table. In another room, police found an elderly male connected to a respirator.

Co-defendant Stanley Williams pled guilty as charged on February 17, 2000. At trial, in addition to the above testimony, a criminologist with the New Orleans Police Department Crime Laboratory testified that the rocks in the container, the two additional rocks, and the pipes all tested positive for cocaine. Defendant was found guilty as charged by a jury of six and was sentenced as a multiple offender to serve four years in the department of corrections. On May 23, 2001, her conviction was reversed by the Fourth Circuit Court of Appeal, which found that the evidence introduced at trial was constitutionally insufficient to support the conviction.

Issue

In reviewing the sufficiency of the evidence to support a conviction, an appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that the State proved the essential elements of the crime beyond a reasonable doubt.

Reasoning

Toups was charged with possession of cocaine, a violation of Louisiana Revised Statute 40–967, which makes it unlawful for any person to knowingly or intentionally possess a controlled dangerous substance. The State need not prove that the defendant was in physical possession of the narcotics found; constructive possession is sufficient to support a conviction. The law on constructive possession is that a person may be in constructive possession of a drug even though it is not in his physical custody, if it is subject to his dominion and control. Also, a person may be deemed to be in joint possession of a drug that is in the physical custody of a companion if he willfully and knowingly shares with the other the right to control it. . . . Guilty knowledge is an essential ingredient of the crime of unlawful possession of an illegal drug. . . . However, it is well settled that the mere presence in an area where

drugs are located or the mere association with one possessing drugs does not constitute constructive possession.

A determination of whether there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute constructive possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, his physical proximity to the drugs, and "evidence that the area was frequented by drug users."

Toups argued to the jury that the only evidence connecting her with the drugs was her mere presence in the area where the drugs were found. However, most, if not all, of the factors used to determine whether a defendant exercised dominion and control sufficient to constitute constructive possession have been met in this case: (1) Toups inevitably had knowledge that drugs were in the area in that they were in plain view directly in front of her; (2) Toups had access to the area where the drugs were found; (3) Toups was in very close physical proximity to the drugs; and (4) the area was frequented by drug users, as the police received confidential information on the morning of October 18, 1999, that Williams was conducting drug transactions, and the police did a controlled purchase of drugs from Williams that afternoon, and another sixteen rocks of cocaine were on the sofa next to Williams.

While there was no evidence presented of any specific relationship between Toups and Stanley Williams, it is reasonable to conclude that they were not strangers, given that she was with Williams for at least thirty minutes prior to their arrest and that Williams would not sit at his coffee table with crack cocaine in plain view ready to be smoked with someone he did know personally or someone who he did not know would be amenable to using the drugs. Further, although there was no evidence presented of recent drug use, the fact that the drugs and paraphernalia were on the table in front of them and that the paraphernalia contained drug residue suggests that they were preparing to use, or had already used, drugs. Finally, it is important to note that the jury was presented with evidence that Toups gave a false name, "Mary Billiot," to the police upon her arrest, indicating consciousness of guilt. Various courts have held that evidence of flight, concealment, and attempt to avoid apprehension indicate consciousness of guilt, and these are among the circumstances from which the jury may infer guilt. The jury was presented with all this evidence and determined that Toups exercised dominion and control over the drugs sufficient to constitute constructive possession. We find that this evidence was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.

We disagree with the court of appeal's view that "considering the evidence adduced at trial, one can only speculate as to what the defendant was doing in the residence," suggesting that "she could have been a non–drug using member of a neighborhood church proselytizing defendant." The jury rejected the "innocent" hypothesis that Toups was merely present at the sofa in front of illegal drugs for the obvious reasons that there was no evidence presented to lead the jury to that conclusion and that any hypothesis other than that of possessing drugs was unreasonable. We agree.

Further, the cases relied upon by the court of appeal in reversing defendant's conviction are distinguishable. In *State v. Bell,* this court held that a rational fact finder could not have concluded from the mere presence of narcotics in a wrapped package among cassette tapes on the console of a car that the defendant, a passenger in the vehicle, was in possession of the contraband. This court stated that even assuming the defendant "was aware of the contents" of the package, no rational fact finder could have concluded that he "exercised control and dominion over the package, or that he willfully and knowingly shared with [the co-defendant] the right to control it." However, contrary to the facts in *Bell* where the drugs were wrapped in a package with no accompanying paraphernalia and therefore not susceptible to immediate use, in this case the drugs and necessary paraphernalia were placed directly in front of Toups ready for use.

This case is also distinguishable from the other case cited by the court of appeal, *State v. Jackson,* in which the court of appeal reversed the jury's verdict finding the defendant guilty of attempted possession of cocaine. The defendant was found standing in front of a homemade bar in a co-defendant's residence, on which were displayed a mirror with cocaine residue, two cocaine pipes (one of which was positive for cocaine residue), and one razor blade with cocaine residue. The court of appeal found that although the defendant was standing next to drug paraphernalia, there was no evidence that the pipe with residue was warm or that the defendant was anything other than a guest in the house. In the instant case, Toups was not only near paraphernalia that had been used at some unknown time, she was seated in front of two rocks of cocaine, not mere residue, in plain view and within arm's length.

This case is more in line with *State v. Harris,* which is similar in every respect except that the defendant in that case was the brother of the person who rented the apartment, whereas Toups' relationship to Williams is unknown. In *Harris,* the court of appeal found that where the defendant was sitting at his brother's kitchen table where cocaine was easily accessible and openly displayed along with drug paraphernalia, and the defendant's brother was nearby free-basing cocaine, the evidence was sufficient to establish that the defendant knowingly possessed the drugs in the kitchen. Although the defendant claimed he was only at his brother's house to eat a chicken dinner, the jury did not accept this hypothesis of innocence, and the court of appeal confirmed the conviction.

Holding

We find that the evidence presented in this case, viewed in the light most favorable to the prosecution, was

sufficient to convince a rational trier of fact that the State proved that defendant exercised dominion and control over the cocaine sufficient to constitute constructive possession beyond a reasonable doubt. Most, if not all, of the factors used to help make this determination were present in this case. In addition, defendant gave police a false name upon her arrest. While certainly one could speculate about other reasons for defendant's presence at the residence, given the facts presented, the jury correctly concluded that any other explanation was unreasonable. For the reasons stated herein, the judgment of the court of appeal is reversed, and defendant's conviction and sentence are reinstated.

Dissenting, *Calogero, J.*

Neither the presence of the accused in an area where drugs are located nor the defendant's mere association with one possessing drugs necessarily constitutes constructive possession. A corollary to that rule is that the State must present evidence of constructive possession other than mere presence or mere association in order to support a defendant's conviction. In reversing the defendant's conviction, the court of appeal cited two cases that correctly demonstrate the application of that rule to defendants found in the presence of drugs in other people's residences, like the defendant in the instant case.

In *Jackson,* the defendant's conviction for constructive possession was correctly reversed by the court of appeal, because the State failed to present any evidence of constructive possession except mere presence or mere association. The *Jackson* defendant was found standing at a homemade bar displaying drug paraphernalia with traces of cocaine residue inside a residence into which the police followed an individual who had discarded drugs in plain view. The court of appeal's reversal was based on the lack of evidence to show that the residue-containing pipe was warm, that the defendant's fingerprints were on any of the items, that the defendant tested positive for cocaine, or that the defendant was anything more than a guest at the residence. Conversely, in *Harris,* the defendant's conviction for constructive possession was correctly affirmed by the court of appeal, because the State presented sufficient evidence of constructive possession, not just evidence of mere presence or mere association. In that case, police executing a search warrant of the defendant's brother's house discovered the defendant seated at the kitchen table with another individual, while his brother was free-basing cocaine at the kitchen sink. On the kitchen table in front of the defendant were a plastic bag containing cocaine, 54 marijuana cigarettes, drug paraphernalia, cash, and two plates, one of which tested positive for cocaine. The court correctly found that evidence was sufficient to support defendant's conviction for constructive possession.

In the instant case, police officers executing a search warrant discovered the defendant seated beside the resident of the address on a sofa three feet in front of a coffee table bearing drug paraphernalia with traces of cocaine and two rocks of crack cocaine. She was not sitting at a table—round, square, or otherwise—with drugs directly in front of her. She was charged with constructive possession of the two rocks of crack cocaine on the coffee table.

The majority distinguishes this case from *Jackson* by noting that actual drugs were present in plain sight within defendant's reach in this case, while only drug paraphernalia was present in the *Jackson* case. However, the drug paraphernalia in *Jackson* contained cocaine residue, which this court has found sufficient to support drug possession convictions. Moreover, the fact that the drugs were located within defendant's reach is insufficient, by itself, to support a defendant's conviction for constructive possession.

Similar to what it did in *Jackson,* the State in the instant case presented no evidence to show that the crack pipes were warm, that defendant's fingerprints were found on any of the drug paraphernalia, that defendant had ingested any cocaine, that defendant intended to ingest cocaine, or that defendant was anything more than a guest in the residence. At the same time, in contrast to *Harris* case, the State presented no evidence in the instant case that anyone was ingesting drugs in the residence when the police arrived, or that anyone had ingested drugs in the residence while defendant was present. In fact, the State presented no evidence of constructive possession except mere presence or mere association.

Accordingly, I respectfully dissent from the majority decision reversing the judgment of the court of appeal and reinstating defendant's conviction and sentence. I would affirm the judgment reversing the conviction.

Questions for Discussion

1. What must the prosecution prove beyond a reasonable doubt to convict Toups of constructive possession of narcotics? Why was Toups not charged with possession of the sixteen rocks of cocaine?
2. Summarize the factors relied on in the majority opinion to establish Toups's constructive possession of the narcotics.
3. Explain why the dissent argues that the prosecution failed to establish Toups's constructive possession of the drugs.
4. Explain how the majority and dissent differ in their interpretations of *Jackson* and *Harris*.
5. Are you persuaded that Toups exercised dominion and control over the narcotics sufficient to establish constructive possession? Specifically address why you believe that Toups did or did not have constructive possession.

Cases and Comments

1. ***Constructive Possession.*** Ross Cashen was convicted of marijuana possession. He was a passenger in the back seat of an automobile that was stopped for a traffic violation. There were six people in the car, four of whom were in the back seat. Cashen was sitting next to a window with his girlfriend sitting on his lap. A lighter and cigarette rolling papers were found on Cashen and cigarette rolling papers and a small baggie of marijuana seeds were discovered in the pants pocket of his girlfriend. The officers also found a baggie of marijuana wedged in the rear seat on the side where Cashen and his girlfriend had been seated. The baggie was stuck in the crack between the back and bottom of the rear seat. At the jail, Cashen denied knowledge of the marijuana and later told the police that the drugs belonged to his girlfriend. She subsequently confessed to owning the drugs. Cashen was prosecuted and convicted for marijuana possession.

The Iowa Supreme Court noted that the issue was whether Cashen exercised constructive possession over the marijuana. His presence alone was ruled to be insufficient to establish possession, because he was not in exclusive possession of the automobile and did not have exclusive access to the back seat. The rolling papers, at most, demonstrated that Cashen possessed marijuana "in the past and intended to do so again in the future. However, we cannot infer from this fact alone that Cashen had authority or the ability to exercise unfettered influence of these drugs." Cashen's question to the police whether anyone had "fessed up to ownership may indicate that he had knowledge of the presence of the drugs, but does not constitute 'dominion and control over the marijuana.'"

The Iowa Supreme Court stressed that Cashen was not the owner of the automobile, the drugs were not in plain view, and the marijuana was not found among Cashen's personal effects. Cashen was completely cooperative, and the police also did not offer evidence indicating that Cashen's fingerprints were on the baggie. The other three passengers were as close to the narcotics as Cashen, and the prosecution was "required to prove facts other than mere proximity to show [Cashen's] dominion and control of the drugs."

Are appellate courts imposing too stringent a standard of proof and impeding the effort to combat drug possession and drug dealing? On the other hand, are prosecutors unjustifiably filing charges of drug possession? See *State v. Cashen,* 666 N.W.2d 566 (Iowa, 2003).

Compare *Cashen* with the U.S. Supreme Court case of *Maryland v. Pringle*. The Supreme Court affirmed Pringle's conviction for possession with intent to distribute cocaine and possession of cocaine, and he was sentenced to ten years in prison. Pringle was one of three passengers in an automobile that was stopped for speeding in the early morning hours in Baltimore. He was sitting in the front seat directly in front of the glove compartment, which contained $763. Five plastic glassine baggies of cocaine were behind him in the back seat armrest and were accessible to all three passengers. The Supreme Court concluded that it is entirely reasonable to conclude "that any or all . . . of the occupants [of this confined space] had knowledge of, and exercised dominion and control over the cocaine. . . . There was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly." The Court stressed that the quantity of drugs and cash indicated the "likelihood of drug dealing" and that a "dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." See *Maryland v. Pringle,* 540 U.S. 366 (2004).

2. ***Constructive Possession of a Firearm.*** Defendant Shawn Spivey was convicted of various counts, including possession of a firearm, while in the course of committing a drug offense. Spivey shared an apartment with his wife, Niki Harrison, who also was convicted of various narcotics-related offenses. Harrison and the couple's five-year-old son were home when the police served a warrant on their Plainfield, New Jersey, apartment. The police spotted Spivey across the street, and in the process of detaining Spivey, an officer suffered a concussion and a broken nose. Spivey and Harrison denied knowledge of the drugs, paraphernalia, guns, and ammunition found in the house. Police also found and seized cash, which Spivey claimed that he had earned by raising pit bull terriers. The confiscated items included 700 grams of marijuana and hundreds of resealable plastic bags in a blue bag in the bedroom as well as vials of cocaine, a digital scale, a police scanner, and over $7,000 in cash. In the kitchen, the police discovered additional marijuana, a .22-caliber revolver, hollow point bullets, rounds of ammunition, and another cylinder for a .22-caliber pistol. Eight pit bull terriers were found in a pen in the backyard.

Spivey sought to overturn his conviction under a New Jersey statute that, in part, provides that "any person who has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a violation of [a drug offense involving distribution or intent to distribute] is guilty of a crime . . ." He argued that this statute requires either actual physical possession or constructive possession of a weapon that is located in close proximity to the defendant during the commission of a drug offense. Spivey pointed out that he was arrested on the street and found to be in constructive possession of a gun that was inside his apartment.

A New Jersey appellate court affirmed Spivey's conviction and explained the "rationale for the statute is to deter and punish the involvement of drug dealers with firearms and the risk of violence engendered by mixing guns with illegal drug distribution." The trial court judge thus was determined to have correctly instructed the jurors that they could find Spivey guilty of the firearms

offense in the event that they found joint, constructive possession of the gun in the kitchen cabinet as well as joint, constructive possession with intent to distribute the cocaine or marijuana found in the apartment.

Does this decision unreasonably expand constructive possession to convict the defendant of possession of a firearm during a narcotics offense? See *State v. Harrison,* 818 A.2d 487 (N.J.a.d., 2003).

You Decide

4.4 Walker drove an automobile owned by his passenger Darlene Ables. They approached a Quonset hut filled with stolen property that Faulkner County, Arkansas, law enforcement had placed under surveillance. Walker and Ables allegedly had missed the turn to Ables's mother's home. An officer stopped the auto at roughly 1:30 A.M. A search of Ables revealed a clear plastic bag containing methamphetamine residue. A canine search led to the seizure of a pair of work gloves under the driver's seat. Tinfoil wrapped around methamphetamine was discovered in one of the gloves. The police reported that Walker was cooperative throughout the investigation. He was convicted in an Arkansas court of the possession of a controlled substance and possession of drug paraphernalia (tinfoil).

Constructive possession requires that the prosecution establish beyond a reasonable doubt that the defendant exercised care, control, and management over contraband and knew that the material was contraband. Constructive possession need not be established by actual possession and may be established by circumstantial evidence. Joint occupancy of a home or vehicle alone is not sufficient to establish constructive possession. Arkansas courts consider whether the contraband was in the open or within the defendant's personal effects, whether the contraband was on the same side of the automobile as the defendant, whether the defendant was owner of the car or exercised dominion or control over the automobile, and whether the defendant acted in a suspicious fashion.

Would you affirm or reverse Walker's convictions? One of the appellate court judges noted that Walker had previous narcotics convictions; would this fact make a difference in your decision? See *Walker v. State,* 72 S.W.3d 517 (Ark. App. 2002).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

In 1989, Denver, Colorado, enacted an ordinance banning pit bulls from the city. The law was precipitated by dog attacks that resulted in the death of a five-year-old boy and the savage maiming of a pastor. Denver had experienced twenty such attacks over a five-year period. The Colorado legislature subsequently passed a law prohibiting counties and municipalities from enacting breed-specific bans on dogs. In December 2004, a Denver court ruled that Colorado lacked the authority to prevent the city from prohibiting any person from "owning, possessing, keeping, exercising control over, maintaining, harboring, or selling a Pit Bull in the City and County of Denver." A pit bull is defined in the ordinance as any dog that is an American Pit Bull Terrier, an American Staffordshire Terrier, a Staffordshire Bull Terrier, or any dog displaying the majority of the physical traits of any one or more of these breeds.

Animal control officers under the ordinance are authorized to confiscate pit bulls, and a determination then is made by a veterinarian as to whether the dog is one of the three "banned breeds." In the event that the animal is found to be a member of a banned breed, the owner is provided the opportunity to remove the dog from the city. A failure to retrieve the animal results in the dog being put to sleep. A second offense of possession results in automatic euthanization. An owner who retrieves his or her dog must provide a statement listing the dog's new home. The penalty for harboring an illegal pit bull is a fine of up to $1,000 and a year in jail. The ordinance permits the transportation of a pit bull through Denver so long as the dog remains in a vehicle. Since 1989, opponents of the Denver ordinance estimate that roughly 1,100 pit bulls have been seized and put down. There reportedly have been no deaths in Denver from pit bulls since the prohibition went into effect. As for national statistics, roughly thirty-eight percent of the 238 deaths of humans from dogs between 1979 and 1998 resulted from pit bulls and Rottweilers.

Denver and Miami are the largest cities to ban pit bulls, and similar laws are being considered by several states and municipalities. Thirteen states have legislation that prohibits breed-specific bans. The legislation in most states focus on a dog's behavior rather than on a dog's breed. The typical approach is represented by Michigan, which prohibits "dangerous dogs"; such an animal is defined as a dog that "bites or attacks a person, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner." An exception is made for an attack against trespassers and persons who provoke or torment the animal, or in those instances in which the animal acts to protect an individual.

The Denver ordinance is based on the belief that pit bulls tend to be inherently aggressive toward other animals and children and inflict more severe injuries than other dogs. In addition, the breed is favored by gang

members and drug dealers. Defenders of the breed claim that pit bulls are no more dangerous than other dogs and that most of the pit bulls that are impounded are completely harmless. Historically, various breeds have been victims of the same form of social hysteria that is being directed at pit bulls. Linda Blair has spoken out against the pit bull ban and has argued that it is irresponsible owners that present the problem rather than the breed.

Some courts have struck down pit bull ordinances on the ground that the term *pit bull* "is vague and risks depriving owners of their pets without due process of law." The majority view, however, is that the regulation of pit bulls is a valid exercise of the state and local government's power to protect the public health and safety. A Kansas court found that pit bulls "possess a strongly developed 'kill instinct' not shared by other breeds of dogs," are "unique in their 'savageness and unpredictability,'" and are "twice as likely to cause multiple injuries as other breeds of dogs." See *Hearn v. City of Overland Park*, 772 P.2d 758 (Kan. 1989).

Would you support a pit bull ban in your local community?

Chapter Summary

A crime involves a *concurrence* between an *actus reus* (act) and *mens rea* (intent). The act generally must have *caused* the social harm punishable under the relevant statute.

A crime is limited to acts and omissions; an individual may not be punished for "mere thoughts." This would involve an unacceptable degree of governmental intrusion into individual privacy and would result in the disproportionate punishment of individuals for ideas that ultimately may not be translated into criminal conduct. An act must be voluntary. It is fundamentally unfair to punish individuals for involuntary acts that are the product of a disease or the unconscious and are not the product of a conscious and deliberate choice. The punishment of an individual based on status is also considered "particularly obnoxious" and "cruel and unusual," because it involves punishment for a personal condition or characteristic that may not be translated into socially harmful acts.

The criminal law, with some limited exceptions, typically does not punish individuals for a failure to act. There are limited circumstances in which individuals are required to assist those in peril. These involve a status, statute, contract, assumption of duty, creation of peril, and control and ownership of property.

The possession of contraband is also subject to punishment based on a knowing and voluntary acquisition or failure to dispose of the material. Possession requires "dominion and control." This may be actual or constructive as well as either individual or joint.

Chapter Review Questions

1. Why are individuals not punished for their thoughts?
2. What is the reason for requiring a voluntary act? Provide some examples of acts that are considered involuntary. May a defendant be criminally condemned for reckless driving despite the fact that an accident results from a stroke?
3. Why do status offenses constitute cruel and unusual punishment?
4. Is there a difference between the American and European rules on omissions? What are the reasons behind the American rule? When does a duty arise to intervene to assist an individual in peril?
5. Discuss the difference between actual and constructive possession and between sole and joint possession. What facts are important in establishing possession?

Legal Terminology

actual possession
actus reus
American bystander rule
attendant circumstances
constructive possession
duty to intervene
European bystander rule
fleeting possession
Good Samaritan statute
involuntary act
joint possession
knowing possession
mens rea
mere possession
omission
possession
preparatory offense
result crime
status offense
voluntary act

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read about post-traumatic stress and Iraq war veterans.
2. Learn more about the Kitty Genovese case. Could a similar incident happen today?
3. Learn about the history of the Denver pit bull ordinance.

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Mens Rea, Concurrence, Causation

5

Did the defendant know that his pet tiger cats endangered his daughter?

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood fifty-seven inches tall and weighed eighty pounds. At dusk that evening, Lauren joined Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing her spinal cord. She died instantly . . . Hranicky testified . . . [that] he did not view the risk to be substantial because he thought the tigers were domesticated and had bonded with the family. . . . Thus, he argues, he had no knowledge of any risk.

Core Concepts and Summary Statements

Introduction

One of the common law's great contributions is to limit blameworthy individuals' criminal guilt to "morally blameworthy" individuals.

A. A criminal offense requires a criminal intent.
B. The requirement of a criminal intent is based on "moral blameworthiness," a conscious decision to intentionally or knowingly engage in criminal conduct or to act in a reckless or negligent fashion.
C. *Mens rea,* or criminal intent, includes four possible states of mind. The most blameworthy crimes are said to have been done *purposely;* others, in descending order of culpability, are crimes committed *knowingly, recklessly,* or *negligently.*
D. Strict liability offenses require an *actus reus,* but do not incorporate a *mens rea* requirement. These typically are public welfare offenses or acts designated as crimes to protect public safety and security by regulating food, drugs, and transportation.

Concurrence

There must be a concurrence between a criminal intent and a criminal act that causes a prohibited harm or injury.

Causation

A. A criminal act must be the cause in fact or "but for" cause of a harm or injury, as well as the legal or proximate cause.
B. A coincidental intervening act breaks the chain of causation caused by a defendant's criminal act, unless the intervening act was foreseeable.
C. A responsive intervening act does not break the chain of causation caused by a defendant's criminal act, unless the intervening act was both abnormal and unforeseeable.

Introduction

In the last chapter we noted that a criminal act or *actus reus* is required to exist in unison with a criminal intent or *mens rea,* and as you soon will see, these two components must combine to *cause* a prohibited injury or harm. This chapter completes our introduction to the basic elements of a crime by introducing you to criminal intent, concurrence, and causation.

One of the common law's great contributions to contemporary justice is to limit criminal punishment to "morally blameworthy" individuals who consciously choose to cause or to create a risk of harm or injury. Individuals are punished based on the harm caused by their decision to commit a criminal act rather than because they are "bad" or "evil" people. Former Supreme Court Justice Robert Jackson observed that a system of punishment based on intent is a celebration of the

"freedom of the human will" and the "ability and duty of the normal individual to choose between good and evil." Jackson noted that this emphasis on individual choice and free will assumes that criminal law and punishment can deter people from choosing to commit crimes, and those who do engage in crime can be encouraged to develop a greater sense of moral responsibility and avoid crime in the future.[1]

Mens Rea

You read in the newspaper that your favorite rock star shot and killed one of her friends. There is no more serious crime than murder, yet before condemning the killer you want to know, "What was on her mind?" The rock star may have intentionally aimed and fired the rifle. On the other hand, she may have aimed and fired the gun believing that it was unloaded. We have the same act, but a different reaction based on whether the rock star intended to kill her friend or acted in a reckless manner. As Oliver Wendell Holmes, Jr. famously remarked, "Even a dog distinguishes between being stumbled over and being kicked."[2]

As we have seen, it is the bedrock principle of criminal law that a crime requires an act or omission and a criminal intent. The appropriate punishment of an act depends to a large extent on whether the act was intentional or accidental. Law texts traditionally have repeated that *actus non facit rum nisi mens sit rea:* "There can be no crime, large or small, without an evil mind." The "mental part" of crimes is commonly termed ***mens rea*** ("guilty mind") or ***scienter*** ("guilty knowledge") or criminal intent. The U.S. Supreme Court noted that the requirement of a "relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory (not responsible) plea, 'But I didn't mean to.'"[3]

The common law originally punished criminal acts and paid no attention to the mental element of an individual's conduct. The killing of an individual was murder, whether committed intentionally or recklessly. Canon, or religious law, with its stress on sinfulness and moral guilt, helped to introduce the idea that punishment should depend on an individual's "moral blameworthiness." This came to be fully accepted in the American colonies, and, as observed by the U.S. Supreme Court, *mens rea* is now the "rule of, rather than the exception to, the principles . . . of American criminal jurisprudence." There are some good reasons for requiring moral blameworthiness.

- *Responsibility.* It is just and fair to hold a person accountable who intentionally chooses to commit a crime.
- *Deterrence.* Individuals who act with a criminal intent pose a threat to society and should be punished in order to discourage them from violating the law in the future and in order to deter others from choosing to violate the law.
- *Punishment.* The punishment should fit the crime. The severity of criminal punishment should depend on whether an individual's act was intentional, reckless, or accidental.

The concept of *mens rea* has traditionally been a source of confusion, and the first reaction of students and teachers has been to flee from the topic. This is understandable when it is realized that in 1972, U.S. statutes employed seventy-six different terms to describe the required mental element of federal crimes. This laundry list included terms such as *intentionally, knowingly, fraudulently, designedly, recklessly, wantonly, unlawfully, feloniously, willfully, purposely, negligently, wickedly,* and *wrongfully.* These are what Justice Jackson termed "the variety, disparity and confusion" of the judicial definition of the "elusive mental element" of crime.[4]

The Evidentiary Burden

The prosecution must establish the required *mens rea* beyond a reasonable doubt. Professor Hall observed that we cannot observe or record what goes on inside an individual's mind. The most reliable indication of intent is a defendant's confession or statement to other individuals. Witnesses may also testify that they saw an individual take careful aim when shooting or that a killing did not appear to be accidental.[5]

In most cases, we must look at the surrounding circumstances and apply our understanding of human behavior. In *People v. Conley,* a high school student at a party hit another student with a

wine bottle, breaking the victim's upper and lower jaws, nose, and cheek and permanently numbing his mouth. The victim and his friend were alleged to have made insulting remarks at the party and were leaving when one of them was assaulted with a wine bottle. The attacker was convicted of committing an aggravated battery that "intentionally" or "knowingly" caused "great bodily harm or permanent disability or disfigurement." The defendant denied possessing this intent. An Illinois appellate court held that the "words, the weapon used, and the force of the blow . . . the use of a bottle, the absence of warning and the force of the blow are facts from which the jury could reasonably infer the intent to cause permanent disability." In other words, the Illinois court held that the defendant's actions spoke louder than his words in revealing his thoughts. Evidence that helps us indirectly establish a criminal intent or criminal act is termed **circumstantial evidence**.[6]

The Model Penal Code Standard

The common law provided for two confusing categories of *mens rea,* a general intent and a specific intent. These continue to appear in various state statutes and decisions.

A **general intent** is simply an intent to commit the *actus reus* or criminal act. There is no requirement that prosecutors demonstrate that an offender possessed an intent to violate the law, an awareness that the act is a crime, or that the act will result in a particular type of harm. Proof of the defendant's general intent is typically inferred from the nature of the act and the surrounding circumstances. The crime of battery or a nonconsensual, harmful touching provides a good illustration of a general intent crime. The prosecutor is only required to demonstrate that the accused intended to commit an act that was likely to substantially harm another. In the case of a battery, this may be inferred from factors such as the dangerous nature of the weapon, the number of blows, and the statements uttered by the accused. A statute that provides for a general intent typically employs terms such as *intentionally* or *willfully* to indicate that the crime requires a general intent.

A **specific intent** is a mental determination to accomplish a specific result. The prosecutor is required to demonstrate that the offender possessed the intent to commit the *actus reus* and then is required to present additional evidence that the defendant possessed the specific intent to accomplish a particular result. For example, a battery with an intent to kill requires proof of a battery along with additional evidence of a specific intent to murder the victim. The classic example is common law burglary. This requires the *actus reus* of breaking and entering and evidence of a specific intent to commit a felony inside the dwelling. Some commentators refer to these offenses as **crimes of cause and result** because the offender possesses the intent to "cause a particular result."

Courts often struggle with whether statutes require a general or specific intent. The consequences can be seen from the Texas case of *Alvarado v. State*. The defendant was convicted of "intentionally and knowingly" causing serious bodily injury to her child by placing him in a tub of hot water. The trial judge instructed the jury that they were merely required to find that the accused deliberately placed the child in the water. The appellate court overturned the conviction and ruled that the statute required the jury to find that the defendant possessed the intent to place the child in hot water, as well as the specific intent to inflict serious bodily harm.[7]

You may encounter two additional types of common law intent. A **transferred intent** applies when an individual intends to attack one person but inadvertently injures another. In *People v. Conley,* Conley intended to hit Marty but instead struck and inflicted severe injuries on Sean. Nevertheless, he was convicted of aggravated battery. The classic formulation of the common law doctrine of transferred intent states that the defendant's guilt is "exactly what it would have been had the blow fallen upon the intended victim instead of the bystander." Transferred intent also applies to property crimes in cases where, for example, an individual intends to burn down one home, and the wind blows the fire onto another structure, burning the latter dwelling to the ground.

For a deeper look at this topic, visit the study site.

Constructive intent is a fourth type of common law intent. This was applied in the early twentieth century to protect the public against reckless drivers and provides that individuals who are grossly and wantonly reckless are considered to intend the natural consequences of their actions. A reckless driver who caused an accident that resulted in death is, under the doctrine of constructive intent, guilty of a willful and intentional battery or homicide.

In 1980, the U.S. Supreme Court complained that the common law distinction between general and specific intent had caused a "good deal of confusion."[8] The Model Penal Code attempted to clearly define the mental intent required for crimes by providing four easily understood levels of responsibility. All crimes requiring a mental element (some do not, as we shall see) must include

one of the four mental states provided in the Model Penal Code. These four types of intent, in descending order of culpability, are

- purposely,
- knowingly,
- recklessly, and
- negligently.

Model Penal Code

Section 2.02. General Requirements of Culpability

(1) Minimum Requirements of Culpability. . . . [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) **Purposely**.
A person acts purposely with respect to material elements of an offense when:
(i) . . . it is his conscious object to engage in conduct of that nature or to cause such a result. . . .

(b) **Knowingly**.
A person acts knowingly . . . when:
(i) If the element involves the nature of his conduct . . . he is aware of the existence of such circumstances or he believes or hopes that they exist; and
(ii) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) **Recklessly**.
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) **Negligently**.
A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Analysis

- *Purposely.* "You borrowed my car and wrecked it on purpose."
- *Knowingly.* "You may not have purposely wrecked my car, but you knew that you were almost certain to get in an accident because you had never driven such a powerful and fast automobile."
- *Recklessly.* "You may not have purposely wrecked my car, but you were driving over the speed limit on a rain-soaked and slick road in heavy traffic and certainly realized that you were extremely likely to get into an accident."
- *Negligently.* "You may not have purposely wrecked my car and apparently did not understand the power of the auto's engine, but I cannot overlook your lack of awareness of the risk of an accident. After all, any reasonable person would have been aware that such an expensive sports car would pack a punch and would be difficult for a new driver to control."

We now turn our attention to a discussion of each type of criminal intent.

Purposely

The Model Penal Code established *purposely* as the most serious category of criminal intent. This merely means that a defendant acted "on purpose" or "deliberately." In legal terms, the defendant must possess a specific intent or "conscious object" to commit a crime or cause a result. A murderer pulls the trigger with the purpose of killing the victim, the burglar breaks and enters with the purpose of committing a felony inside the dwelling, and a thief possesses the purpose of permanently depriving an individual of the possession of his or her property.

Did the defendant intend to engage in ethnic intimidation?

Commonwealth v. Barnette, *699 N.E.2D 1230 (MASS. APP. 1988), Opinion by: Lenk, J.*

This case arises out of an altercation between next door neighbors in Lexington. The victims, Maria Acuna and her son Israel Rodriguez, are Mexican Americans. The defendant is predominately African American. During the incident, the defendant allegedly threatened to kill Acuna and Rodriguez, calling them, among other things, "damn Mexicans," and telling them to "get out of here." After trial, a jury convicted the defendant of two counts of assault or battery for the purpose of intimidation . . . and two counts of threatening to commit a crime . . . We affirm.

Facts

In the early evening of September 21, 1995, Maria Acuna was working at her computer on the second floor of her home in Lexington, where she had been living with her son, Israel Rodriguez, since May 1995. The defendant was next door at his sister's house babysitting his niece. Acuna heard a loud noise, like someone banging or shaking a wooden fence, looked out her window, and saw the defendant trying to enter her back yard to retrieve his niece's ball. Concerned that the defendant was going to break her fence, Acuna called through the window to the defendant to please not trespass, and that she would come downstairs to help him out.

The defendant shouted, "You b__ I just came to pick up my ball." Acuna went downstairs and walked into her backyard, and observed that the defendant had entered her yard, and was turning to leave. As the defendant left her yard, he repeatedly called her a "b__" and told her that she could keep the ball the next time. Acuna walked toward the fence to latch the gate, and the defendant said,

> You b__. You don't fit here. What are you doing here, you damn Mexican? Why don't you go back to your country? All of you come and get our jobs and our houses. Get out of here. You don't fit here. I'll kill you, and your son.

While standing next to the fence shouting at Acuna, the defendant thrust his fist toward her face so that she "could almost feel the hit of his fist" in her nose and face. The defendant then threw his fingers in a forking motion toward her, coming to within an inch of her eyes. The defendant was yelling at Acuna so loudly that Rodriguez awoke from his nap and came outside to the backyard. Rodriguez testified that he could hear the defendant shouting "f__," "s__," "Mexican," "get the hell out of the country," "you don't belong here," and "Mexicans don't belong here" at his mother. He pulled his mother away from the fence and demanded to know from the defendant what was going on. The defendant now attempted to hit Rodriguez with his fists, from the other side of the fence, rattling the gate, trying to enter the backyard, and saying, "You little s___. Come up here. I'm going to take the f___ing s__ out of you and your mother together. I will beat you both to death." The defendant continued saying, "Damn Mexicans. What are you doing here?" Acuna and Rodriguez both testified that they felt afraid and threatened by the defendant's rage and determination to hit them.

At the time of the incident, the defendant's neighbor, Michael Townes, was barbecuing in his backyard, approximately twenty feet away. Townes heard the defendant yell at Acuna and Rodriguez, "You should go back to where you're from" and refer to "whupping" Rodriguez's ass. Townes came over and, smelling alcohol on the defendant's breath, told the defendant to "Let it go" and to go home and "sleep it off." Townes put his hands on the defendant and led him away. Rodriguez went inside and, after calling Townes to express his gratitude, called the police.

Officer Paul Callahan responded to the call and arrived at Acuna's residence to find her and her son visibly upset. Callahan filed an incident report and tried, unsuccessfully, to locate the defendant. The next day, Detective Charles Mercer returned to the neighborhood and interviewed the defendant.

In response to the detective's questions, the defendant asserted that he entered the yard to retrieve the ball only after knocking on the fence and not receiving

a response, that Acuna had appeared and yelled at him for not going around to ring the bell, and that he did not swear at or threaten Acuna. Nonetheless, the defendant did admit that he had said that Acuna should "go back to where she came from," but claims to have said it to his neighbor Townes, not directly to Acuna.

Issue

The defendant argues that the judge erred in denying his motion for a required finding of not guilty on the two counts of assault or battery for the purpose of intimidation. The defendant claims that the Commonwealth presented insufficient evidence that he acted "for the purpose of intimidation. . . ."

Massachusetts General Laws chapter 265 section 39, is a so-called hate crime statute. It provides that "whoever commits an assault or a battery upon a person . . . for the purpose of intimidation because of said person's race, color, religion, or national origin, shall be punished. . . ." As described to the jury by the trial judge, the essential elements of the crime are (1) the commission of an assault or battery (2) with the intent to intimidate (3) because of a person's race, color, religion, or national origin. In general, a hate crime is "crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." . . . Thus, hate crime laws . . . operate to "enhance the penalty of criminal conduct when it is motivated by racial hatred or bigotry." It is not the conduct but the underlying motivation that distinguishes the crime.

Here, the defendant was convicted of assaulting the victims for the purpose of intimidation. The intent required . . . was not only that required to establish the underlying assault, that is, the intent either to cause a battery or to cause apprehension of immediate bodily harm, but also the intent to intimidate because of the victim's membership in a protected class. . . .

Reasoning

At trial, Acuna and Rodriguez both testified that throughout the altercation that gave rise to this case, the defendant repeatedly called them "damn Mexicans" and demanded that they "get out of here." Acuna testified that the defendant verbally attacked her, saying that she should go back to her country and that he would kill her and her son. Rodriguez testified that the defendant told him that he was going to beat up Rodriguez and his "b___y" mother. Both Acuna and Rodriguez also testified that they felt threatened by the defendant's behavior. The Commonwealth presented ample evidence that the defendant assaulted Acuna and Rodriguez with the intent to intimidate them because of their national origin. . . . A rational trier of fact could find that the defendant's repetition of the phrase "damn Mexican," accompanied by his repeated demand that Acuna and Rodriguez "get out of here," demonstrated a purpose of intimidation because of the victims' national origin. . . .

Holding

The defendant contends that his outburst at Acuna and Rodriguez was motivated by his anger at being called a trespasser and was not motivated by any anti-Mexican sentiment. The defendant believes that the fact that his niece is of Puerto Rican descent demonstrates that he lacks any anti-Hispanic bias or prejudice. The uncontroverted evidence at trial, however, was that the defendant was shouting specifically anti-Mexican slurs at Acuna and Rodriguez, not that he expressed any more generalized anti-Hispanic animus. Moreover, the evidence submitted in conjunction with the defendant's motion for new trial established merely that the defendant's niece was of Puerto Rican descent, not that the defendant thought favorably of Puerto Ricans or Hispanics in general. . . . The trial judge did not err in denying the defendant's motion for new trial. . . .

Questions for Discussion

1. In your own words, explain the "purpose" or specific intent that the prosecution must establish beyond a reasonable doubt under the hate crimes statute in order to convict a defendant.
2. List the facts relied on by the prosecution to prove that the defendant possessed a purpose or intent to intimidate. As the defense attorney, what would you argue to persuade the court that your client did not possess the required intent?
3. Had Barnette uttered the same remarks and not physically threatened his neighbors, would he have been found guilty of a hate crime involving a threat to inflict serious bodily harm? Would the police have arrested Barnette for ethnic intimidation had he said nothing and physically threatened his neighbors? Is it significant that this was the first time that Barnette had made these types of statements to his neighbors?
4. As a prosecutor, would you have devoted time and energy to prosecuting Barnette?
5. Would you have considered prosecuting him for assault and battery rather than for a hate crime?

You Decide

5.1 Craig Johnson was convicted of the misdemeanor of making harassing phone calls to his former girlfriend G.B. from February through March 2006. G.B. then obtained a restraining order, which resulted in Johnson discontinuing the calls. G.B. testified that when she ended their relationship in February 2006, she told Johnson that she did not want to see or hear from him again, and that if he bothered her, she would obtain a restraining order.

Johnson placed 119 calls to G.B.'s home, work, and cell phone numbers during a thirty-day period following the breakup. Most of the calls were brief. G.B. did not answer, and Johnson left messages. Johnson admitted that he knew that the calls were "frustrating" to G.B. and admitted that she had asked him not to call. G.B. testified that Johnson "would break [her] down" and that she had switched jobs to different buildings several times to try to avoid the calls. Johnson also tried to contact G.B. by appearing uninvited at her home, at a training class that she was attending, and at her child's birthday party.

An individual is liable for making harassing phone calls under Minnesota law if he or she "repeatedly makes telephone calls" or "makes or causes the telephone of another repeatedly or continuously to ring" when these acts are undertaken "with the specific intent to abuse, disturb or cause distress." Johnson argues that the evidence is insufficient to infer that he possessed the specific intent to harass G.B. by telephoning her. He contends that his intent was to express his love and that he wanted to resume their seven-year relationship.

Would you convict Johnson of making harassing phone calls? See *State v. Johnson*, 2008 Minn. App. Unpub. LEXIS 913.

You can find the answer at www.sagepub.com/lippmanccl2e

Knowingly

An individual satisfies the knowledge standard when he or she is "aware" that circumstances exist or a result is practically certain to follow from his or her conduct. Examples of knowledge of circumstances are to knowingly "possess narcotics" or to knowingly "receive stolen property." It is sufficient that a person is aware that there is a high probability that property is stolen; he or she need not be certain. An illustration of a result that is practically certain to occur is a terrorist who bombs a public building knowing the people inside are likely to be maimed or injured or to die.

For an international perspective on this topic, visit the study site.

The commentary to the Model Penal Code uses the example of treason to illustrate the difference between purpose and knowledge. In *United States v. Haupt,* Chicago resident Hans Haupt was accused of treason during World War II based on the assistance he provided to his son, whom he knew was a German spy. The U.S. Supreme Court ruled that treason requires a specific intent (purpose) to wage war on the United States. Haupt claimed that as a loving father, he knowingly assisted his son, who unfortunately happened to be sympathetic to the German cause, and he did not possess the purpose to injure the U.S. government. The Supreme Court, however, pointed to Haupt's statements that "he hoped that Germany would win the war" and that "he would never permit his son to fight for the United States" as indicating that Haupt's "son had the misfortune of being a chip off the old block."[9]

In the next case in the chapter, *State v. Nations,* the defendant remained "willfully blind" or deliberately unaware of the criminal circumstances and claims that she did not knowingly violate the law. This type of situation typically arises in narcotics prosecutions in which drug couriers claim to have been unaware that they were transporting drugs.[10]

Did the defendant know the dancer's age?

State v. Nations, *676 S.W.2D 282 (MO. APP. 1984),* Opinion by: Satz, J.

Issue

Defendant, Sandra Nations, owns and operates the Main Street Disco, in which police officers found a scantily clad sixteen-year-old girl dancing for tips. Consequently, defendant was charged with endangering the welfare of a child "less than seventeen years old." Defendant was convicted and fined $1,000. Defendant appeals. We reverse.

Specifically, defendant argues the State failed to show she knew the child was under seventeen and, therefore, failed to show she had the requisite intent to endanger the welfare of a child "less than seventeen years old." We agree.

Reasoning

The pertinent part of section 568.050 provides as follows:

> (1) A person commits the crime of endangering the welfare of a child if:
>
> . . . .
>
> (2) He knowingly encourages, aids or causes a child less than seventeen years old to engage in any conduct which causes or tends to cause the child to come within the provisions of subdivision (1)(c) . . . of section 211.031, RSMo. . . ."

Thus, section 568.050 requires the State to prove the defendant "knowingly" encouraged a child "less than seventeen years old" to engage in conduct tending to injure the child's welfare, and "knowing" the child to be less than seventeen is a material element of the crime.

"Knowingly" is a term of art, whose meaning is limited to the definition given to it by our present criminal code. Literally read, the code defines "knowingly" as actual knowledge—"A person 'acts knowingly,' or with knowledge, (1) with respect . . . to attendant circumstances when he is aware . . . that those circumstances exist. . . ." So read, this definition of "knowingly" or "knowledge" excludes those cases in which "the fact [in issue] would have been known had not the person willfully 'shut his eyes' in order to avoid knowing." The Model Penal Code, the source of our criminal code, does not exclude these cases from its definition of "knowingly." Instead, the Model Penal Code proposes that "[when] knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence ." . . .

The additional or expanded definition of "knowingly" proposed in section 2.02(7) of the Model Penal Code "deals with the situation British commentators have denominated **willful blindness** or connivance," the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. . . . The inference of "knowledge" of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief. . . .

Our legislature, however, did not enact this proposed definition of "knowingly." . . . The sensible, if not compelling, inference is that our legislature rejected the expansion of the definition of "knowingly" to include willful blindness of a fact, and chose to limit the definition of "knowingly" to actual knowledge of the fact. Thus, in the instant case, the State's burden was to show defendant actually was aware the child was under seventeen, a heavier burden than showing there was a "high probability" that the defendant was aware that the child was under seventeen. . . .

Facts

The record shows that, at the time of the incident, the child was sixteen years old. When the police arrived, the child was dancing on stage for tips with another female. The police watched her dance for some five to seven minutes before approaching defendant in the service area of the bar. Believing that one of the girls appeared to be "young," the police questioned defendant about the child's age. Defendant told them that both girls were of legal age and that she had checked the girls' identification when she hired them. When the police questioned the child, she initially stated that she was eighteen but later admitted that she was only sixteen. She had no identification.

The State also called the child as a witness. Her testimony was no help to the State. She testified the defendant asked her for identification just prior to the police arriving, and she was merely crossing the stage to get her identification when the police took her into custody. Nor can the State secure help from the defendant's testimony. She simply corroborated the child's testimony; i.e., she asked the child for her identification; the child replied she would "show it to [her] in a minute"; the police then took the child into custody.

Holding

These facts simply show defendant was untruthful. Defendant could not have checked the child's identification, because the child had no identification with her that day, the first day defendant hired the child. This does not prove that defendant knew the child was less than seventeen years old. At best, it proves defendant did not know or refused to learn the child's age. . . . Having failed to prove defendant knew the child's age was less than seventeen, the State failed to make a . . . case.

Admittedly, a person in defendant's shoes can easily avoid conviction of a crime under section 568.050 by simply refusing to check the age of dancers. This result is to be rectified, however, by the legislature, not by judicial redefinition of already precisely defined statutory language or by improper inferences from operative facts. The Model Penal Code's expanded definition of "knowingly" attracts us by its logic. Apparently, it was not as attractive to our legislature for use throughout our criminal code. . . .

Questions for Discussion

1. Why does the court conclude that the defendant is not guilty under the statute of endangering the welfare of the young dancer?
2. In your view, was the defendant aware that there was a "high probability" that the dancer was under seventeen and for that reason intentionally avoided checking her age?
3. How does the Missouri statute differ from the Model Penal Code in regard to willful blindness? What is the impact of the court decision for offenses involving the possession of narcotics?
4. How would you amend the Missouri statute to eliminate the willful blindness defense?
5. If you were a judge, how would you rule in *Nations?*

You Decide

5.2 Defendant Andy Hypolite is a citizen of Trinidad and Tobago. His cousin and his cousin's friend offered him a round-trip airline ticket to fly to New York and transport $70,000 back to Trinidad. Hypolite was to receive $6,000 on his return. At the airport in Trinidad, his cousin's friend gave Hypolite "drink packets" that appeared to be milk products. U.S. Customs officials in New York found that the packets actually contained 2.9 kilograms of cocaine, and they arrested Hypolite. Hypolite claimed that he was unaware that he was transporting illegal drugs. He conceded that he had a "strong suspicion" that the packets contained narcotics, but he did not ask whether the packages contained drugs, because he "blanked it out" and tried "not to pry too much."

Was Hypolite guilty of knowingly importing illegal drugs into the United States? See *United States v. Hypolite,* 81 F. App'x 751 (2003).

You can find the answer at www.sagepub.com/lippmanccl2e

Recklessly

We all know people who enjoy taking risks and skirting danger and who are confident that they will beat the odds. These reckless individuals engage in obviously risky behavior that they know creates a risk of substantial and unjustifiable harm and yet do not expect that injury or harm will result.

Why does the law consider individuals who are reckless less blameworthy than individuals who act purposely or knowingly?

- Individuals who act purposely deliberately create a harm, and individuals who act knowingly are aware that injury is certain to follow.
- Individuals acting recklessly, in contrast, disregard a strong probability that harm will result.

Recklessness is big, bold, and outrageous. Recklessness involves a conscious disregard of a substantial and unjustifiable risk. This must constitute a gross deviation from the standard of conduct that a law-abiding person would observe in a similar situation. The reckless individual speeds down a street where children usually play, builds and sells to an uninformed buyer a house that is situated on a dangerous chemical waste dump, manufactures an automobile with a gas tank that likely will explode in the event of an accident, or locks the exit doors of a rock club during a performance in which a band ignites fireworks.

The Model Penal Code provides a two-fold test for reckless conduct:

- *A Conscious Disregard of a Substantial and Unjustifiable Risk*. The defendant must be *personally aware* of a severe and serious risk. *Unjustifiable* means that the harm was not created in an effort to serve a greater good, such as speeding down the street in an effort to reach the hospital before a passenger who was in auto accident bleeds to death.
- *A Gross Deviation From the Standard That a Law-Abiding Person Would Observe in the Same Situation*. The defendant must have acted in a fashion that demonstrates a clear lack of judgment and concern for the consequences. This must clearly depart from the behavior that would be expected of other law-abiding individuals. Note this is an *objective test based on the general standard of conduct*.

In *Hranicky v. State,* the next case in the chapter, the court is confronted with the challenge of determining whether the defendant recklessly caused serious bodily injury to his stepdaughter.

Was the defendant aware of the risk posed by the tigers to his daughter?

Hranicky v. State, *13–00–431-CR (Tex. App. 2004), Opinion by: Catillo, J.*

Bobby Lee Hranicky appeals his conviction for the second-degree felony offense of recklessly causing serious bodily injury to a child. A jury found him guilty, sentenced him to eight years confinement in the Institutional Division of the Texas Department of Criminal Justice, and assessed a $5,000 fine. On the jury's recommendation, the trial court suspended the sentence and placed Hranicky on community supervision for ten years.

Facts

A newspaper advertisement offering tiger cubs for sale caught the eye of eight-year-old Lauren Villafana. She decided she wanted one. She expressed her wish to her mother, Kelly Dean Hranicky, and to Hranicky, her stepfather. Over the next year, the Hranickys investigated the idea by researching written materials on the subject and consulting with owners of exotic animals. They visited tiger owner and handler Mickey Sapp several times. They decided to buy two rare tiger cubs from him, a male and a female whose breed is endangered in the wild. . . .

Sapp trained Hranicky in how to care for and handle the animals. In particular, he demonstrated the risk adult tigers pose for children. Sapp escorted Hranicky, Kelly Hranicky, and Lauren past Sapp's tiger cages. He told the family to watch the tigers' focus of attention. The tigers' eyes followed Lauren as she walked up and down beside the cages.

The Hranickys raised the cubs inside their home until they were six or eight months old. Then they moved the cubs out of the house, at first to an enclosed porch in the back and ultimately to a cage Hranicky built in the yard. The tigers matured into adolescence. The male reached 250 pounds, the female slightly less. Lauren actively helped Hranicky care for the animals.

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood fifty-seven inches tall and weighed eighty pounds. At dusk that evening, Lauren joined Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing her spinal cord. She died instantly.

The record reflects four different versions of the events that led to Lauren's death. Hranicky told the grand jury that he and Lauren were sitting side-by-side in the cage about 8:00 P.M., petting the female tiger. A neighbor's billy goat cried out. The noise attracted the male tiger's attention. He turned toward the sound. The cry also caught Lauren's attention. She stood and looked at the male tiger. When Lauren turned her head toward the male tiger, "That was too much," Hranicky told the grand jury. The tiger attacked. Hranicky yelled. The tiger grabbed Lauren by the throat and dragged her across the cage into a water trough. Hranicky ran after them. He struck the tiger on the head and held him under the water. The tiger released the child.

Kelly Dean Hranicky testified she was asleep when the incident occurred. She called for emergency assistance. Through testimony developed at trial, she told the dispatcher her daughter had fallen from a fence. She testified she did not remember giving that information to the dispatcher. However, police officer Daniel Torres, who responded to the call, testified he was told that a little girl had cut her neck on a fence.

Hranicky gave Torres a verbal statement that evening. Torres testified Hranicky told him that he had been grooming the female tiger. He asked Lauren to come and get the brush from him. Lauren came into the cage and grabbed the brush. Hranicky thought she had left the cage, because he heard the cage door close. Then, however, Hranicky saw Lauren's hand "come over and start grooming the female, start petting the female cat, and that's when the male cat jumped over." The tiger grabbed the child by the neck and started running through the cage. It dragged her into the water trough. Hranicky began punching the tiger in the head, trying to get the tiger to release Lauren.

Justice of the Peace James Dawson performed an inquest at the scene of the incident. Judge Dawson testified Hranicky gave him an oral statement also. Hranicky told him Lauren went to the cage on a regular basis and groomed only the female tiger. He then corrected himself to say she actually petted the animal. Hranicky was "very clear about the difference between grooming and petting." Hranicky maintained that Lauren never petted or groomed the male tiger. Hranicky told Dawson that Lauren asked permission to enter the cage that evening, saying "Daddy, can I come in?"

Sapp, the exotic animal owner who sold the Hranickys the tigers, testified Hranicky told him yet another version of the events that night. When Sapp asked Hranicky how it happened, Hranicky replied, "Well, Mickey, she just snuck in behind me." Hranicky admitted to Sapp he had allowed Lauren to enter the cage. Hranicky told Sapp he had lied because he did not want Sapp to be angry with him.

Hranicky told the grand jury that Sapp and other knowledgeable sources had said "there was no problem in taking a child in the cage." He did learn children were especially vulnerable, because the tigers would view them as prey. However, Hranicky told the grand jury, he thought the tigers would view Lauren differently than they would an unfamiliar child. He believed the tigers would not attack her, he testified. They would see her as "one of the family." Hranicky also told the grand jury

the tigers' veterinarian allowed his young son into the Hranickys' tiger cage.

Several witnesses at trial contradicted Hranicky's assessment of the level of risk the tigers presented, particularly to children. Sapp said he told the Hranickys it was safe for children to play with tiger cubs. However, once the animals reached forty to fifty pounds, they should be confined in a cage and segregated from any children. "That's enough with Lauren, any child, because they play rough, they just play rough." Sapp further testified he told the Hranickys to keep Lauren away from the tigers at that point, because the animals would view the child as prey. He also said he told Lauren directly not to get in the cage with the tigers. Sapp did not distinguish between children who were strangers to the tigers and those who had helped raise the animals. He described any such distinction as "ludicrous." In fact, Sapp testified, his own two children had been around large cats all of their lives. Nonetheless, he did not allow them within six feet of the cages. The risk is too great, he told the jury. The Hranickys did not tell him that purchasing the tigers was Lauren's idea. Had he known, he testified, "that would have been the end of the conversation. This was not for children." He denied telling Hranicky that it was safe for Lauren to be in the cage with the tigers.

Charles Currer, an animal care inspector for the U.S. Department of Agriculture (USDA), met Hranicky when Hranicky applied for a USDA license to exhibit the tigers. Currer also denied telling Hranicky it was permissible to let a child enter a tiger's cage. He recalled giving his standard speech about the danger big cats pose to children, telling him that they "see children as prey, as things to play with."

On his USDA application form, Hranicky listed several books he had read on animal handling. One book warned that working with exotic cats is very dangerous. It emphasized that adolescent males are particularly volatile as they mature and begin asserting their dominance. Big cat handlers should expect to get jumped, bit, and challenged at every juncture. Another of the listed books pointed out that tigers give little or no warning when they attack. The book cautioned against keeping large cats such as tigers as pets.

Veterinarian Dr. Hampton McAda testified he worked with the Hranickys' tigers from the time they were six weeks old until about a month before the incident. McAda denied ever allowing his son into the tigers' cage. All large animals present some risk, he testified. He recalled telling Hranicky that "wild animals and female menstrual periods . . . could cause a problem down the road" once both the animals and Lauren matured. Hranicky seemed more aware of the male tiger, the veterinarian observed, and was more careful with him than with the female. . . .

James Boller, the chief cruelty investigator for the Houston Society for the Prevention of Cruelty to Animals, testified that tigers, even those raised in captivity, are wild animals that act from instinct. Anyone who enters a cage with a conscious adult tiger should bring a prop to use as a deterrent. Never take one's eyes off the tiger, Evans told the jury. Never make oneself appear weak and vulnerable by diminishing one's size by crouching or sitting. Never bring a child into a tiger cage. The danger increases when the tigers are in adolescence, which begins as early as two years of age for captive tigers. Entering a cage with more than one tiger increases the risk. Entering with more than one person increases the risk further. Entering with a child increases the risk even more. Tigers' activity level depends on the time of day. . . . Boller identified eight o'clock on a summer evening as a high activity time. A child should never enter a tiger cage in the first place, Boller testified. Taking a child into a tiger cage "during a high activity time for the animal is going to increase your risk dramatically."

Dr. Richard Villafana, Lauren's biological father, told the jury he first learned of the tigers when his daughter told him over the phone she had a surprise to show him at their next visit. When he came to pick her up the following weekend, he testified, she took him into the house and showed him the female cub. Villafana described his reaction as "horror and generalized upset and dismay, any negative term you care to choose." He immediately decided to speak to Kelly Hranicky about the situation. He did not do so in front of Lauren, however, in an effort to avoid a "big argument." Villafana testified he later discussed the tigers with Kelly Hranicky, who assured him Lauren was safe. . . . As the tigers matured, no one told Villafana the Hranickys allowed Lauren in the cage with them. Had he known, he "would have talked to Kelly again" and "would have told her that [he] was greatly opposed to it and would have begged and pleaded with her not to allow her in there." He spoke to his daughter about his concerns about the tigers "almost every time" he saw her.

Kelly Hranicky told the jury Lauren was a very obedient child. Villafana agreed. Lauren would not have gone into the tiger cage that evening without Hranicky's permission.

Issue

. . . Did Hranicky act in a reckless fashion?

Reasoning

The record reflects that each of the witnesses who came into contact with Hranicky in connection with the tigers testified they told him that (1) large cats, even those raised in captivity, are dangerous, unpredictable wild animals; and (2) children were particularly at risk from adolescent and adult tigers, especially males. Expert animal handlers whom Hranicky consulted and written materials he claimed to have read warned Hranicky that the risks increased with adolescent male tigers, with more than one person in the cage, with more than one tiger in the cage, at dusk during the animals' heightened activity period, and when diminishing one's size by sitting or crouching on the ground. They each cautioned that

tigers attack swiftly, without warning, and are powerful predators.

Further, Hranicky's initial story to Sapp that Lauren had sneaked into the cage evidences Hranicky's awareness of the risk. The jury also could have inferred his awareness of the risk when he concealed from Sapp that the family was purchasing the tigers for Lauren. The jury also could have inferred Hranicky's consciousness of guilt when he gave several different versions of what happened.

On the other hand, the record shows that before buying the tigers, Hranicky researched the subject and conferred with professionals. He received training in handling the animals. Further, Kelly Hranicky testified she also understood the warnings about not allowing children in the tiger cage to apply to strangers, not to Lauren. Hranicky told the grand jury he did not think the warnings applied to children, like Lauren, who had helped raise the animal. He said he had seen other handlers, including Sapp and McAda, permit Lauren and other children to go into tiger cages. He testified Currer told him it was safe to permit children in tiger cages. Further, while the State's witness described zoo policies for handling tigers, those policies were not known to the general public. Finally, none of the significant figures in Lauren's life fully appreciated the danger the tigers posed for Lauren. Hranicky was not alone in not perceiving the risk. . . .

Holding

Hranicky testified to the grand jury he did not view the risk to be substantial, because he thought the tigers were domesticated and had bonded with the family. He claimed not to have any awareness of any risk. The tigers were acting normally. Lauren had entered the cage numerous times to pet the tigers with no incident. Further, he asserted, other than a minor scratch by the male as a cub, the tigers had never harmed anyone. Thus, he argues, he had no knowledge of any risk.

Viewing all the evidence neutrally, favoring neither Hranicky nor the State, we find that proof of Hranicky's guilt of reckless injury to a child is not so obviously weak as to undermine confidence in the jury's determination. Nor do we do not find that the proof of his guilt is greatly outweighed by contrary proof.

Questions for Discussion

1. Did Hranicky's disregard constitute a substantial and unjustifiable risk? Did his actions constitute a gross deviation from the standard of conduct that a law-abiding person would observe in a similar situation?
2. Why does the court consider it to be a close call as to whether Hranicky was aware of the risk posed by the tigers to Lauren?
3. Would the result be the same in the event that the tigers attacked Lauren when they were tiger cubs and were first living in the home?
4. What if Bobby Lee Hranicky had been mauled and killed by the tiger? Would a court convict Kelly Hranicky of recklessly causing Bobby Lee's death?

You Decide

5.3 Norma Suarez left home with her son P and her daughters N.E. and A.E. in the car. She stopped to visit Michelle Dominguez and then drove to the home of Violanda Corral, P's grandmother. Suarez left P at Corral's home and started toward home. N.E. was in the front passenger seat and A.E. was in the back seat. Suarez arrived home to find that A.E. was not in the auto. It later was learned that A.E. had fallen from the car as the vehicle crossed the Continental Bridge, was struck by another car, and died of head injuries. Suarez was convicted of recklessly endangering A.E., who was three years old at the time, by failing to properly supervise her child. It was a crime in Texas at the time of this incident for the operator of a motor vehicle to fail to secure a child over two and younger than four years of age by a seat belt or child seat.

An investigating police officer testified that A.E. fell out of the front passenger window. The officer also found that the seat belt clips in the back seat were "pushed down . . . along the crease" indicating "non-use." Suarez contended that A.E. put the belt on herself when they left home. Dominguez testified that she later buckled A.E. in the car. Corral stated that she told Suarez to "make sure you buckle up the girls" and testified that she saw Suarez look toward the back seat and then put N.E. in the front seat. Corral indicated that she had no doubt that A.E. was properly secured with a seat belt. There was testimony that A.E. could unbuckle the seat belt herself. Other evidence indicated that Suarez stopped at a red light before driving across the bridge to ensure that A.E. was asleep.

Did Suarez recklessly cause A.E.'s death? See *Suarez v. State*, Tex. App. LEXIS 10799 (2003).

You can find the answer at www.sagepub.com/lippmanccl2e

Negligently

Recklessness entails creating and disregarding a risk. The reckless individual consciously lives on the edge, walking on a ledge above the street. Negligence, in contrast, involves engaging in harmful and dangerous conduct while being unaware of a risk that a reasonable person would appreciate. The reckless individual would "play around" and push someone off a cliff into a pool of water that he or she knows contains a string of dangerous boulders and rocks. The negligent individual simply does not bother to check whether the water conceals a rock quarry before pushing another person off the cliff. Recklessness involves an awareness of harm that is lacking in negligence, and for that reason is considered to be of greater "moral blameworthiness."

In considering negligence, keep the following in mind:

- *Mental State*. The reckless individual is aware of and disregards the substantial and unjustifiable risk; the negligent individual is not aware of the risk.
- *Objective Standard*. Recklessness and negligence ask juries to decide whether the individual's conduct varies from that expected of the general public. The reckless individual grossly deviates from the standard of care that a law-abiding person would demonstrate in the situation; the negligent individual grossly deviates from the standard of care that a reasonable person would exhibit under a similar set of circumstances.

It is not always easy to determine whether a defendant was unaware of a risk and is guilty of negligence rather than recklessness. In *Tello v. State,* the defendant was convicted of criminally negligent homicide after a trailer that he was pulling came unhitched, jumped a curb, and killed a pedestrian. Tello argued that he had not previously experienced difficulties with the trailer and claimed to have been unaware that safety chains were required or that the hitch was clearly broken and in need of repair. The court convicted Tello of negligent homicide based on the fact that a reasonable person would have been aware that the failure to safely secure the trailer hitch constituted a gross deviation from the standard of care that an ordinary person would have exhibited and posed a substantial risk of death. Is it credible to believe that Tello regularly used the trailer and yet lacked awareness that the trailer was secured so poorly that a bump in the road was able to separate the trailer from the truck?[11]

People v. Baker illustrates the difficulty of distinguishing negligence from recklessness.

Was the babysitter guilty of negligent or reckless homicide?

People v. Baker, *771 N.Y.S.2D 607 (2004), Opinion by: Rose, J.*

Facts

After a three-year-old child died while defendant was babysitting in the child's home, she was charged with both intentional and depraved indifference murder. At trial, the evidence established that, on a warm summer night, the victim died of hyperthermia as a result of her prolonged exposure to excessive heat in a bedroom of her foster parents' apartment. The excessive heat was caused by the furnace having run constantly for many hours as the result of a short circuit in its wiring. The victim was unable to leave her bedroom, because defendant engaged the hook and eye latch on its door after putting her to bed for the night. Defendant then remained in the apartment watching television while the furnace ran uncontrollably. The victim's foster parents and another tenant testified that when they returned in the early morning hours and found the victim lifeless in her bed, the living room of the apartment where defendant sat waiting for them felt extremely hot, like an oven or a sauna, and the victim's bedroom was even hotter. Temperature readings taken later that morning during a police investigation while the furnace was still running indicated that the apartment's living room was 102 degrees Fahrenheit, the victim's bedroom was 110 degrees Fahrenheit, and the air coming from the vent in the bedroom was more than 130 degrees Fahrenheit.

In characterizing defendant's role in these events, the prosecutor argued that the key issue for the jury was whether or not defendant had intended to kill the victim.

The prosecution's proof on this issue consisted primarily of the second of two written statements given by defendant to police during a four-hour interview conducted a few hours after the victim was found. In the first statement, defendant related that she had been aware of the oppressive heat in the victim's bedroom, kept the victim latched in because the foster parents had instructed her to do so, had not looked at or adjusted the thermostat even though the furnace was running on a hot day, heard the victim kicking and screaming to be let out, and felt the adverse effects of the heat on herself. The second statement, which defendant disavowed at trial, described her intent to cause the victim's death by turning up the thermostat to its maximum setting, closing all heating vents except the one in the victim's bedroom, and placing additional clothing on the victim, which she then removed after the victim died. Because these actions differed from those described in the first statement, and each reflects an intent to kill the victim, the jurors' initial task, as proposed by the prosecutor during summation, was to decide which statement they would accept.

After trial, the jury acquitted defendant of intentional murder, thereby rejecting the second statement, and instead convicted her of depraved indifference murder of a child. County court sentenced her to a prison term of fifteen years to life, and she now appeals.

Issue

Could the jury reasonably infer from the evidence a culpable mental state greater than criminal negligence due to the unique combination of events that led to the victim's death, as well as the lack of proof that defendant actually perceived and ignored an obvious and severe risk of serious injury or death?

Reasoning

The jury's finding that defendant was not guilty of intentional murder clearly indicates that it rejected defendant's second statement containing an explicit admission of an intent to kill. Although the excessive heat ultimately proved fatal, and defendant failed to remove the victim from her bedroom and made no effort to reduce the heat, the evidence does not establish that the defendant created dangerous conditions supporting the jury verdict of a wanton indifference to human life or a depravity of the mind.

Is the defendant guilty of reckless or negligent homicide? There is no evidence that defendant knew the actual temperature in any portion of the apartment or subjectively perceived a degree of heat that would have made her aware that serious injury or death from hyperthermia would almost certainly result. Put another way, the risk of serious physical injury or death was not so obvious under the circumstances that it demonstrated defendant's actual awareness. There was only circumstantial evidence on this point, consisting of the subjective perceptions of other persons who later came into the apartment from cooler outside temperatures. Defendant, who had been in the apartment as the heat gradually intensified over many hours, and who was described by others as appearing flushed and acting dazed, could not reasonably be presumed to have had the same perception of oppressive and dangerous heat. Rather, defendant testified that she knew only that the heat made her feel dizzy and uncomfortable, and she denied any awareness of a risk of death. Most significantly, there is no dispute that defendant remained in a room that was nearly as hot as the victim's bedroom for approximately nine hours and checked on the victim several times before the foster parents returned. This evidence of defendant's failure to perceive the risk of serious injury stands unrefuted by the prosecution.

Defendant's ability to appreciate such a risk was further brought into doubt by the prosecution's own expert witness, who described her as having borderline intellectual function, learning disabilities, and a full-scale IQ of only seventy-three. We also note that here, unlike where an unclothed child is shut outside in freezing temperatures, the circumstances are not of a type from which it can be inferred without a doubt that a person of even ordinary intelligence and experience would have perceived a severe risk of serious injury or death. . . .

A person is guilty of manslaughter in the second degree when he or she recklessly causes the death of another person and of criminally negligent homicide when, with criminal negligence, he or she causes the death of another person. Reckless criminal conduct occurs when the actor is aware of and consciously disregards a substantial and unjustifiable risk, and criminal negligence is the failure to perceive such a risk.

As we have noted, there is no support for a finding that defendant perceived and consciously disregarded the risk of death that was created by the combination of the "runaway" furnace and her failure to release the victim from her bedroom. None of defendant's proven conduct reflects such an awareness, and the fact that she subjected herself to the excessive heat is plainly inconsistent with a finding that she perceived a risk of death.

Holding

However, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt of criminally negligent homicide. A jury could reasonably conclude from the evidence that defendant should have perceived a substantial and unjustifiable risk that the excessive heat, in combination with her inaction, would be likely to lead to the victim's death. . . . Since defendant was the victim's caretaker, this risk was of such a nature that her failure to perceive it constituted a gross deviation from the standard of care that a reasonable person in the same circumstances would observe in such a situation. Thus, defendant's conduct was shown to constitute criminal negligence, and such a finding would not be against the weight of the evidence. Accordingly, we reduce the conviction from depraved indifference murder to criminally negligent homicide and remit the matter to county court for sentencing on the reduced charge.

Questions for Discussion

1. Explain the court's factual basis for determining that the defendant should be held liable for negligent rather than reckless homicide.
2. Should the appellate court overturn the verdict of the jurors who actually observed the trial?
3. As a judge, what would be your ruling in this case?

See more cases on the study site: Koppersmith v. State, *www.sagepub.com/lippmanccl2e*

You Decide

5.4 The fifty-seven-year-old defendant Strong emigrated from Arabia to China and then to the United States. He testified that he was a member of the Sudan Muslim religious faith since birth and became one of the sect's leaders. The three central beliefs of the religion are "cosmetic consciousness, mind over matter, and psysiomatic psychomatic consciousness." Mind over matter empowers a master or leader to lie on a bed of nails without bleeding, walk through fire or on hot coals, perform surgical operations without anesthesia, raise people off the ground, and suspend a person's heartbeat, pulse, and breathing while the individual remained conscious. The defendant claimed that he could stop a follower's heartbeat and breathing and plunge knives into an adherent's chest without injuring the person. Strong testified that he performed this ceremony countless times over the previous forty years.

On January 28, 1972, Strong performed this ceremony on Kenneth Goings, a recent recruit to the sect. The wounds from the hatchet and three knives that Strong inserted into Goings proved fatal. Prior to being stabbed, Goings objected, and the defendant stated that "it will be all right, son." The defendant and one of his adherents testified that they perceived no danger and, in fact, the adherent had volunteered to participate. Another member of the sect claimed that Strong had performed this ritual on another occasion without harming the individual involved in the ritual.

The defendant was convicted of reckless manslaughter at trial and appealed the refusal of the trial judge to instruct the jury to consider a conviction for criminally negligent homicide. Should the judge remand the case for a new trial and instruct the trial court judge to permit the jurors to decide for themselves whether the defendant is guilty of either reckless or negligent homicide? See *People v. Strong*, 338 N.E.2d 602 (N.Y. 1975).

You can find the answer at www.sagepub.com/lippmanccl2e

Strict Liability

We all have had the experience of telling another person that "I don't care why you acted in that way; you hurt me and that was wrong." This is similar to a strict liability offense. A **strict liability** offense is a crime that does not require a *mens rea,* and an individual may be convicted based solely on the commission of a criminal act.

Strict liability offenses have their origin in the industrial development of the United States in the middle of the nineteenth century. The U.S. Congress and various state legislatures enacted a number of **public welfare offenses** that were intended to protect society against impure food, defective drugs, pollution, and unsafe working conditions, trucks, and railroads. These *mala prohibita* offenses (an act is wrong because it is prohibited) are distinguished from those crimes that are *mala in se* (inherently wrongful, such as rape, robbery, and murder).

The common law was based on the belief that criminal offenses required a criminal intent; this ensured that offenders were morally blameworthy. The U.S. Supreme Court has pronounced that the requirement of a criminal intent, although not required under the Constitution, is "universal and persistent in mature systems of law."[12] Courts, however, have disregarded the strong policy in favor of requiring a criminal intent in upholding the constitutionality of *mala prohibita* laws. Congress and state legislatures typically indicate that these are strict liability laws by omitting language such as "knowingly" or "purposely" from the text of the law. Courts look to several factors in addition to the textual language in determining whether a statute should be interpreted as providing for strict liability:

- The offense is not a common law crime.
- A single violation poses a danger to a large number of people.
- The risk of the conviction of an "innocent" individual is outweighed by the public interest in preventing harm to society.
- The penalty is relatively minor.

- A conviction does not harm a defendant's reputation.
- The law does not significantly impede the rights of individuals or impose a heavy burden. Examples are the prohibition of acts such as "selling alcohol to minors" or "driving without a license."
- These are acts that most people avoid, and individuals who engage in such acts generally possess a criminal intent.

The argument for strict liability offenses is that these laws deter unqualified people from participating in potentially dangerous activities, such as the production and selling of pharmaceutical drugs, and that those who engage in this type of activity will take extraordinary steps to ensure that they proceed in a cautious and safe fashion. There is also concern that requiring prosecutors to establish a criminal intent in these relatively minor cases will consume time and energy and divert resources from other cases.

There is a trend toward expanding strict liability into the non–public welfare crimes that carry relatively severe punishment. Many of these statutes are criticized for imposing prison terms without providing for the fundamental requirement of a criminal intent. For instance, in *State v. York,* the defendant was sentenced to one year in prison in Ohio after he was convicted of having touched the buttocks of an eleven-year-old girl. The appellate court affirmed his conviction for "gross sexual imposition" and ruled that this was a strict liability offense and that the prosecutor was required to demonstrate only a prohibited contact with an individual under thirteen that could be perceived by the jury as sexually arousing or gratifying to the defendant.[13]

The U.S. Supreme Court indicated in *Staples v. United States* that it may not be willing to continue to accept the growing number of strict liability public welfare offenses. The National Firearms Act was intended to restrict the possession of dangerous weapons and declared it a crime punishable by up to ten years in prison to possess a "machine gun" without legal registration. The defendant was convicted for possession of an AR-15 rifle, which is a semiautomatic weapon that can be modified to fire more than one shot with a single pull of the trigger. The Supreme Court interpreted the statute to require a *mens rea,* explaining that the imposition of a lengthy prison sentence has traditionally required that a defendant possess a criminal intent. The Court noted that gun ownership is widespread in the United States and that a strict liability requirement would result in the imprisonment of individuals who lacked the sophistication to determine whether they purchased or possessed a lawful or unlawful weapon.[14]

The Model Penal Code, in section 1.04(5), accepts the need for strict liability crimes while limiting these crimes to what the code terms "violations." Violations are not subject to imprisonment and are punishable only by a fine, forfeiture, or other civil penalty, and they may not result in the type of legal disability (e.g., result in loss of the right to vote) that flows from a criminal conviction.

In the next case in the chapter, *State v. Walker,* Walker was convicted of knowingly or intentionally delivering cocaine within 1,000 feet of a school. The Indiana Supreme Court was asked to decide whether the trial court was correct in ruling that the prosecution was not required to establish that Walker knew that there was a school nearby, because this is a strict liability offense. The answer was important to Walker, because delivering the cocaine within 1,000 feet of a school enhanced his sentence from ten to twenty years in prison. Pay attention to the majority and to the dissenting opinion, and ask yourself whether this should be a strict liability offense.

Is dealing in cocaine within 1,000 feet of a school a strict liability offense?

State v. Walker, *668 N.E.2D 243 (IND. 1996),* Opinion by: Shephard, C. J.

Issue

Appellant Aaron Walker contends that to sustain a conviction for dealing in cocaine within 1,000 feet of a school, as a class A felony, the State must prove that the defendant had actual knowledge that the sale was occurring within 1,000 feet of a school.

Facts

The State charged Walker with dealing in cocaine after he sold the drug to an undercover police officer, Ernie Witten. Armed with a $20 bill to make a purchase and a microphone taped to his chest, Witten drove to the parking lot of an Indianapolis apartment complex near

Public School No. 114. He noticed a group of young men sitting under a shade tree. One of these motioned to Witten, a sign the officer interpreted as asking what the officer wanted. Witten held up one finger, intending to indicate that he wanted one rock of cocaine. The young man made another motion that Witten construed as an instruction to pull around. The officer did so.

Once Witten had parked his truck, Walker approached and asked what he was looking for. Witten replied he wanted "a twenty," which is street slang for $20 worth of crack cocaine. Walker reached into his pocket, took out a plastic bag containing "several rocky hard white substances," and handed one to Witten. Witten gave Walker the marked $20 bill and the transaction was over.

Walker was eventually arrested and charged. A jury found him guilty of dealing in cocaine as a class A felony and determined that he was a habitual offender. The trial judge gave him the presumptive sentence for dealing, thirty years, and added thirty years for the habitual offender finding.

The statute under which Walker was convicted declares that "(a) A person who: (1) Knowingly or intentionally . . . (C) Delivers . . . cocaine . . . commits dealing in cocaine, a Class B felony punishable by ten years in prison." The statute elevates the offense to a class A felony punishable by thirty years in prison if the person "delivered . . . the drug in or on school property or within one thousand (1,000) feet of school property or on a school bus."

Reasoning

Walker does not dispute the evidence offered at trial that the transaction occurred 542 feet from the school. The statute does not contain any express requirement that a defendant know that a transaction is occurring within 1,000 feet of a school, but Walker argues that permitting enhancement of the crime to a class A felony without such proof violates the due process requirement that a conviction rest on proof of each element of the crime. While Walker's argument is difficult to assess in its summary form, we perceive the question to be whether we should interpret the statute as requiring separate proof of scienter with respect to an element for which the legislature has not specifically required proof of knowledge. We have encountered this question in a variety of settings, including statutes we concluded were meant to establish strict liability for so-called white collar crimes. Conversely, Indiana courts have required proof of mental culpability in a number of [other] crimes where statutes did expressly provide that element (e.g., a statute punishing possession of a handgun with an altered serial number requires proof of knowledge of modification of serial number).

Professors LaFave and Scott accurately describe this question as "whether the legislature meant to impose liability without fault or, on the other hand, really meant to require fault, though it failed to spell it out clearly." We noted with approval the seven factors LaFave and Scott have suggested be balanced in deciding this question. One of these factors, the severity of the punishment, suggests that the legislature might have intended to require proof of mental state for the enhancement of dealing in cocaine. Other factors, particularly the great danger of the prohibited conduct and the great number of expected prosecutions, suggest that the General Assembly likely did intend to create a strict liability enhancement. These factors are

1. the legislative history, title, or context of a criminal statute;
2. similar or related statutes;
3. the severity of punishment (greater penalties favor a culpable mental state requirement);
4. the danger to the public of the prohibited conduct (greater danger disfavors need for culpable mental state requirement);
5. the defendant's opportunity to ascertain the operative facts and avoid the prohibited conduct;
6. the prosecutor's difficulty in proving the defendant's mental state; and
7. the number of expected prosecutions (greater numbers suggest that crime does not require a culpable mental state).

Holding

Our assessment of these factors makes it difficult to conclude that the General Assembly intended to require separate proof the defendant knew that the dealing occurred near a school but failed to articulate its intent. Moreover, we can imagine an altogether rational reason the legislature might decide to write a statute with a strict liability punishment provision. As Judge Staton wrote for the court of appeals, "A dealer's lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest." Accordingly, we hold that the conviction was not deficient for failure to prove that Walker knew he was within 1,000 feet of a school when he committed the crime. Accordingly, we affirm the judgment of the trial court.

Dissenting, *DeBruler, J.*

The pertinent language of the Indiana Dealing in Cocaine statute reads as follows:

> (a) A person who knowingly or intentionally . . . delivers . . . cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II . . . : commits dealing in cocaine or a narcotic drug, a Class B felony, except as provided in subsection (b).
>
> Subsection (b) further provides that
>
> the offense is a Class A felony if the amount of the drug involved weighs three (3) grams or

more; the person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three (3) years junior to the person; or the person delivered or financed the delivery of the drug in or on school property or within one thousand (1,000) feet of school property or on a school bus.

Given this language, we are confronted with the question of which parts of the statute the "knowingly or intentionally" language is supposed to modify. The "knowingly or intentionally" phrase in Indiana's Dealing in Cocaine statute, as well as the lack of any language manifesting a contrary purpose, causes it to be more plausibly read to target the drug trade involving children near schools rather than to create a drug free zone around our state's schools. However, its purpose is rather to target those who would sell to school age children and, worse still, recruit them as distributors of illicit drugs. The intent language actually used in the statute indicates a legislative intent to punish the schoolyard pusher more harshly than those who sell to adults in their apartments and homes that merely happen to be within a zone. The legislature could have reasonably believed that drug dealers who sell to adults are bad enough, but those who lurk in the playgrounds of our nation's school to prey upon school age children are worse still. By this reading of the statute, the greater harm created by this particular form of drug trafficking and the greater moral culpability of one involved in such trafficking led the legislature to require proof of a greater level of knowledge for the Class A felony conviction than for the Class B conviction under the Dealing in Cocaine statute. I therefore believe that this reading of the statute clearly requires the State to prove that evil intent by showing that appellant knew that he was dealing within 1,000 feet of a school when he was dealing cocaine.

When the State fails to prove all the elements of a criminal statute, the conviction cannot stand. In the present case, the prosecution made no showing at trial that appellant knew his distance from the school. The only proof addressing the "within 1,000 feet of a school" element of the statute was Detective Witten's testimony that he and his colleagues measured the distance from the site of the controlled buy to the front of Public School 114. Therefore, even the evidence most favorable to the verdict and the reasonable inferences therefrom fail to provide probative evidence from which a reasonable trier of fact could infer the requisite scienter beyond a reasonable doubt.

I would remand this case to the trial court for appellant to be sentenced for the Class B felony of dealing in cocaine.

Questions for Discussion

1. What are the facts in *Walker* that resulted in the enhancement of his sentence for the narcotics offense?
2. Discuss the impact on Walker's prison sentence of his having been convicted of selling narcotics within 1,000 feet of a school.
3. Why does the majority opinion conclude that the selling of cocaine within 1,000 feet of a school is a strict liability offense? Does the arrest of Walker fit within the purpose of the statute?
4. Summarize the argument of the dissenting judge.
5. How would you decide this case?

Cases and Comments

1. ***Handguns.*** A Virginia statute, §18.2–308.1(B), makes it a felony for an individual to possess "any firearm designed or intended to expel a projectile . . . while such person is upon . . . any public . . . elementary . . . school, including buildings and grounds. . . ." Deena Estaban, a fourth-grade elementary school teacher, left a zippered yellow canvas bag in a classroom; the bag was found to contain a loaded .38-caliber revolver. She had taught a class in the room earlier in the day; the class was composed primarily of children in wheelchairs. The defendant claimed that she inadvertently left the gun in the bag that she used to carry various teaching aids. After teaching in the classroom, Esteban took the teaching aids with her but left the yellow bag. Esteban explained that she placed the gun in the bag and took it to the store on the previous Saturday and then forgot that the pistol was in the bag and inadvertently carried it into the school.

The trial court interpreted the statute as providing for a strict liability offense and ruled that the prosecution was not required to demonstrate criminal intent. Esteban was convicted and received a suspended term of incarceration and a fine. The Virginia Supreme Court ruled that the legislature intended to assure that a safe environment exists on or about school grounds and that the presence of a firearm creates a danger for students, teachers, and other school personnel. The court stressed that the fact that Esteban "innocently" brought a loaded revolver into the school "does not diminish the danger." A footnote in the decision indicated that Esteban possessed a concealed handgun permit that specifically did not authorize possession of a handgun on school property.

Would requiring a criminal intent impede the safety and security of the school? Should teachers be permitted to arm themselves? See *Esteban v. Commonwealth,* 587 S.E.2d 523 (Va. 2003).

2. ***An Open Bottle of Intoxicating Liquor.*** Steven Mark Loge was cited for a violation of a Minnesota statute that declares it a misdemeanor for the owner of a motor vehicle, or the driver when the owner is not present, "to keep or allow to be kept in a motor vehicle when such vehicle is upon the public highway any bottle or receptacle containing intoxicating liquors or 3.2 percent malt liquors which has been opened." This does not extend to the trunk or to other areas not normally occupied by the driver or passengers. Loge borrowed his father's pickup truck and was stopped by two police officers while on his way home from work. One of the officers observed and seized an open beer bottle underneath the passenger's side of the seat and also found one full unopened can of beer and one empty beer can in the truck. Loge passed all standard field sobriety tests and was issued a citation for a violation of the open bottle statute.

At trial, Loge testified that the bottle was not his, but he nevertheless was convicted based on a determination by the trial and appellate court that this was a strict liability offense. The Minnesota Supreme Court affirmed that the plain language of the statute indicated that the legislature intended this to be a strict liability offense and that a knowledge requirement would make conviction for possession difficult, if not insurmountable. The Supreme Court also observed that drivers who are aware of this statute will carefully check any case of packaged alcohol before driving in order to ensure that each container's seal is not broken. The dissent noted that the language "allow to be kept" clearly indicated a knowledge requirement. Absent a provision for intent, there is a risk that individuals will be convicted "not simply for an act that the person does not know is criminal, but also for an act the person does not even know he is committing."

Does the prevention of "drinking and driving" justify the possible conviction of innocent individuals? See *State v. Loge,* 608 N.W.2d 152 (Minn. 2000).

You Decide

5.5 In July 1995, Ronnie Polk was the passenger in an automobile that was stopped for a moving violation in close proximity to Highland Christian School in Lafayette, Indiana. A police officer's search led to the seizure of crack cocaine and several tablets of diazepam. In Indiana, possession of more than three grams of cocaine within 1,000 feet of a school is enhanced from a Class D felony to a Class A felony punishable by thirty years in prison, and possession of a "Schedule IV" drug without a doctor's prescription within 1,000 feet of a school is enhanced from a Class D to a Class C felony, punishable by four years in prison.

Polk was convicted and sentenced for both offenses, and his two sentences were to run concurrently. Polk also was convicted of being a habitual offender, and his combined sentence for the three convictions totaled fifty years. Polk maintains that the legislature did not intend for the possession of cocaine within 1,000 feet of a school to be a strict liability offense that applied to passengers possessing narcotics in automobiles, because this did not advance Indiana's interest in protecting schoolchildren. Applying the statute to individuals in automobiles would allow the police to wait to stop automobiles suspected of containing narcotics as they approached within 1,000 feet of a school.

How would you decide *Polk v. State* in light of the precedent established in *State v. Walker?* See *Polk v. State,* 683 N.E.2d 567 (Ind. 1997).

You can find the answer at www.sagepub.com/lippmanccl2e

Concurrence

We now have covered both *actus reus* and *mens rea*. The next step is to understand that there must be a **concurrence** between a criminal act and a criminal intent. *Chronological concurrence* means that a criminal intent must exist at the same time as a criminal act. An example of chronological concurrence is the requirement that a burglary involves breaking and entering with an intent to commit a felony therein. The classic example is an individual who enters a cabin to escape the cold and after entering decides to steal food and clothing. In this instance, the intent did not coincide with the criminal act and the defendant will not be held liable for burglary.

The principle of concurrence is reflected in section 20 of the California Penal Code, which provides that in "every crime . . . there must exist a union or joint operation of act and intent or criminal negligence." The next case is *State v. Rose*. Can you explain why the defendant's guilt for manslaughter depends on the prosecution's ability to establish a concurrence between the defendant's act and intent?

The Legal Equation

Was there a concurrence between the defendant's criminal act and criminal intent?

State v. Rose, *311 A.2D 281 (R.I. 1973),* Opinion by: Roberts, J.

These are two indictments, one charging the defendant, Henry Rose, with leaving the scene of an accident, death resulting . . . and the other charging the defendant with manslaughter. The defendant was tried on both indictments to a jury in the superior court, and a verdict of guilty was returned in each case. Thereafter the defendant's motions for a new trial were denied. . . .

Facts

These indictments followed the death of David J. McEnery, who was struck by defendant's motor vehicle at the intersection of Broad and Summer Streets in Providence at about 6:30 P.M. on April 1, 1970. According to the testimony of a bus driver, he had been operating his vehicle north on Broad Street and had stopped at a traffic light at the intersection of Summer Street. While the bus was standing there, he observed a pedestrian starting to cross Broad Street, and as the pedestrian reached the middle of the southbound lane he was struck by a "dirty, white station wagon" that was proceeding southerly on Broad Street. The pedestrian's body was thrown up on the hood of the car. The bus driver further testified that the station wagon stopped momentarily, the body of the pedestrian rolled off the hood, and the car immediately drove off along Broad Street in a southerly direction. The bus operator testified that he had alighted from his bus, intending to attempt to assist the victim, but was unable to locate the body.

Subsequently, it appears from the testimony of a police officer, about 6:40 P.M. the police located a white station wagon on Haskins Street, a distance of some 610 feet from the scene of the accident. The police further testified that a body later identified as that of David J. McEnery was wedged beneath the vehicle when it was found and that the vehicle had been registered to defendant. . . .

Issue

The defendant is contending that if the evidence is susceptible of a finding that McEnery was killed upon impact, he was not alive at the time he was being dragged under defendant's vehicle, and defendant could not be found guilty of manslaughter. An examination of the testimony of the only medical witness makes it clear that, in his opinion, death could have resulted immediately upon impact by reason of a massive fracture of the skull. The medical witness also testified that death could have resulted a few minutes after the impact but conceded that he was not sure when it did occur.

Reasoning

We are inclined to agree with defendant's contention in this respect. Obviously, the evidence is such that death could have occurred after defendant had driven away with McEnery's body lodged under his car and, therefore, be consistent with guilt. On the other hand, the medical testimony is equally consistent with a finding that McEnery could have died instantly upon impact and, therefore, be consistent with a reasonable conclusion other than the guilt of defendant.

Holding

It is clear, then, that, the testimony of the medical examiner lacking any reasonable medical certainty as to the time of the death of McEnery, we are unable to conclude that on such evidence defendant was guilty of manslaughter beyond a reasonable doubt. Therefore, we conclude . . . that it was error to deny defendant's motion for a directed verdict of acquittal. . . .

We are unable, however, to reach the same conclusion concerning the denial of the motion for a directed verdict of acquittal . . . in which defendant was charged with leaving the scene of an accident. . . .

Questions for Discussion

1. Why is it important to determine whether the victim died on impact with Rose's automobile or whether the victim was alive at the time he was dragged under the defendant's automobile? What is the ruling of the Rhode Island Supreme Court?
2. How does this case illustrate the principle of concurrence?

You Decide

5.6 Jackson administered what he believed was a fatal dose of cocaine to Pearl Bryan in Cincinnati, Ohio. Bryan was pregnant, apparently as a result of her intercourse with Jackson. Jackson and a companion then transported Bryan to Kentucky and cut off her head to prevent identification of the body. Bryan, in fact, was still alive when brought to Kentucky and died as a result of the severing of her head. A state possesses jurisdiction over offenses committed within its territorial boundaries. Can Jackson be prosecuted for the intentional killing of Bryan in Ohio? In Kentucky? See *Jackson v. Commonwealth,* 38 S.W. 422 (Ky. App. 1896).

You can find the answer at www.sagepub.com/lippmanccl2e

Causation

You now know that a crime entails a *mens rea* that concurs with an *actus reus*. Certain crimes (termed *crimes of criminal conduct causing a criminal harm*) also require that the criminal act cause a particular harm or result: the death or maiming of a victim, the burning of a house, or damage to property.

Causation is central to criminal law and must be proven beyond a reasonable doubt. The requirement of causality is based on two considerations: [15]

- *Individual Responsibility.* The criminal law is based on individual responsibility. Causality connects a person's acts to the resulting social harm and permits the imposition of the appropriate punishment.
- *Fairness*. Causality limits liability to individuals whose conduct produces a prohibited social harm. A law that declares that all individuals in close proximity to a crime are liable regardless of their involvement would be unfair and penalize people for being in the wrong place at the wrong time. If such a law were enacted, individuals might hesitate to gather in crowds or bars or to attend concerts and sporting events.

Establishing that a defendant's criminal act caused harm to the victim can be more complicated than you might imagine. Should an individual who commits a rape be held responsible for the victim's subsequent suicide? What if the victim attempted suicide a week before the rape and then killed herself following the rape? Would your answer be the same if the stress induced by the rape appears to have contributed to the victim contracting cancer and dying a year later? What if doctors determine that a murder victim who was hospitalized would have died an hour later of natural causes in any event? We can begin to answer these hypothetical situations by reviewing the two types of causes that a prosecutor must establish beyond a reasonable doubt at trial in order to convict a defendant: **cause in fact** and legal or **proximate cause**.

As noted, causality arises in prosecutions for crimes that require a particular result, such as murder, maiming, arson, and damage to property. The prosecution must prove beyond a reasonable doubt that the harm to the victim resulted from the defendant's unlawful act. You will find that most causality cases involve defendants charged with murder who claim that they should not be held responsible for the victim's death.

Cause in Fact

The cause in fact or factual cause simply requires you to ask whether "but for" the defendant's act, would the victim have died? An individual aims a gun at the victim, pulls the trigger, and kills the

victim. "But for" the shooter's act, the victim would be alive. In most cases, the defendant's act is the only factual cause of the victim's injury or death and is clearly the direct cause of the harm. This is a simple cause-and-effect question. The legal or proximate cause of the victim's injury or death may not be so easily determined.

A defendant's act must be the cause in fact or factual cause of a harm in order for the defendant to be criminally convicted. This connects the defendant to the result. The cause in fact or factual cause is typically a straightforward question. Note that the defendant's act must also be the legal or proximate cause of the resulting harm.

Legal or Proximate Cause

Just when things seemed simple, we encounter the challenge of determining the legal or proximate cause of the victim's death. Proximate cause analysis requires the jury to determine whether it is fair or just to hold a defendant legally responsible for an injury or death. This is not a scientific question. We must consider questions of fairness and justice. There are few rules to assist us in this analysis.

In most cases, a defendant is clearly both the cause in fact and legal cause of the victim's injury or death. However, consider the following scenarios: You pull the trigger and the victim dies. You point out that it was not your fault, since the victim died from the wound you inflicted in combination with a minor gun wound that she suffered earlier in the day. Should you be held liable? In another scenario an ambulance rescues the victim, the ambulance's brakes fail, and the vehicle crashes into a wall, killing the driver and victim. Are you or the driver responsible for the victim's death? You later learn that the victim died after the staff of the hospital emergency room waited five hours to treat the victim and that she would have lived had she received timely assistance. Who is responsible for the death? Would your answer be different in the event that the doctors protest that they could not operate on the victim because of a power outage caused by a hurricane? What if the victim was wounded from the gunshot and, although barely conscious, stumbled into the street and was hit by an automobile or by lightning? In each case, "but for" your act, the victim would not have been placed in the situation that led to his or her death. On the other hand, you might argue that in each of these examples you were not legally liable, because the death resulted from an **intervening cause** or outside factor rather than from the shooting. As you can see from the previous examples, an intervening cause may arise from

- The act of the victim wandering into the street
- An act of nature, such as a hurricane
- The doctors who did not immediately operate
- A wound inflicted by an assailant in combination with a previous injury

Another area that complicates the determination of proximate causes is a victim's preexisting medical condition. This arises when you shoot an individual and the shock from the wound results in the failure of the victim's already seriously weakened heart.

Intervening Cause

Professor Joshua Dressler helps us answer these causation problems by providing two useful categories of intervening acts: **coincidental intervening acts** and **responsive intervening acts**.

Coincidental Intervening Acts

A defendant is not considered legally responsible for a victim's injury or death that results from a coincidental intervening act. (Some texts refer to this as an *independent intervening cause*). The classic case is an individual who runs from a mugger and is hit by and dies from injuries sustained when a tree that has been struck by lightning falls on him. It is true that "but for" the robbery, the victim would not have fled. The defendant nevertheless did not order or compel the victim to run and certainly had nothing to do with the lightning strike that felled the tree. As a result, the perpetrator generally is not held legally liable for a death that results from this unpredictable combination of an attempted robbery, bad weather, and a tree.

Coincidental intervening acts arise when a defendant's act places a victim in a particular place where the victim is harmed by an unforeseeable event.

The Ninth Circuit Court of Appeals offered an example of an unforeseeable event as a hypothetical in the case of *United States v. Main*. The defendant in this example drives in a reckless fashion and crashes his car, pinning the passenger in the automobile. The defendant leaves the scene of the accident to seek assistance, and the semiconscious passenger is eaten by a bear. The Ninth Circuit Court of Appeals observed that reckless driving does not create a foreseeable risk of being eaten by a bear and that this intervening cause is so out of the ordinary that it would be unfair to hold the driver responsible for the victim's death.[16] Another example of an unforeseeable coincidental intervening event involves a victim who is wounded, taken to the hospital for medical treatment, and then killed in the hospital by a knife-wielding mass murderer. Professor Joshua Dressler notes that in this case the unfortunate victim has found himself or herself in the "wrong place at the wrong time."[17]

Defendants will be held responsible for the harm resulting from coincidental causes in those *rare* instances in which the event is "normal and foreseeable" or could have been reasonably predicted. In *Kibbe v. Henderson,* two defendants were held liable for the death of George Stafford, whom they robbed and abandoned on the shoulder of a dark, rural two-lane highway on a cold, windy, and snowy evening. Stafford's trousers were down around his ankles, his shirt was rolled up toward his chest, and the two robbers placed his shoes and jacket on the shoulder of the highway and did not return Stafford's glasses. The near-sighted and drunk Stafford was sitting in the middle of a lane on a dimly lit highway with his hands raised when he was hit and killed by a pickup truck traveling ten miles per hour over the speed limit that coincidentally happened to be passing by at the precise moment that Stafford wandered into the highway.[18]

The defendant generally is legally liable for foreseeable coincidental intervening acts.

Responsive Intervening Acts

The response of a victim to a defendant's criminal act is termed a *responsive intervening act* (some texts refer to this as a *dependent intervening act*). In most instances, the defendant is considered responsible because his or her behavior caused the victim to respond. A defendant is relieved of responsibility only in those instances in which the victim's reaction to the crime is both abnormal and unforeseeable. Consider the case of a victim who jumps into the water to evade an assailant and drowns. The assailant will be charged with the victim's death despite the fact that the victim could not swim and did not realize that the water was dangerously deep. The issue is the *foreseeability* of the victim's response rather than the *reasonableness* of the victim's response. Again, courts generally are not sympathetic to defendants who set a chain of events in motion and generally will hold such defendants criminally liable.

In *People v. Armitage,* David Armitage was convicted of "drunk boating causing [the] death" of Peter Maskovich. Armitage was operating his small aluminum speedboat at a high rate of speed while zigzagging across the river when it flipped over. There were no floatation devices on board, and the intoxicated Armitage and Maskovich clung to the capsized vessel. Maskovich disregarded Armitage's warning and decided to try to swim to shore and drowned. A California appellate court ruled that Maskovich's decision did not break the chain of causation. The "fact that the panic stricken victim recklessly abandoned the boat and tried to swim ashore was not a wholly abnormal reaction to the peril of drowning," and Armitage could not exonerate himself by claiming that the "victim should have reacted differently or more prudently."[19]

Defendants have also been held liable for the response of individuals other than the victim. For instance, in the California case of *People v. Schmies,* defendant Schmies fled on his motorcycle from a traffic stop at speeds of up to ninety miles an hour and disregarded all traffic regulations. During the chase, one of the pursuing patrol cars struck another vehicle, killing the driver and injuring the officer. Schmies was convicted of grossly negligent vehicular manslaughter and of reckless driving. A California court affirmed the defendant's conviction based on the fact that the officer's response and the resulting injury were reasonably foreseeable. The officer's reaction, in other words, was not so extraordinary that it was unforeseeable, unpredictable, and statistically extremely improbable.[20]

Medical negligence has also consistently been viewed as foreseeable and does not break the chain of causation. In *People v. Saavedra-Rodriquez,* the defendant claimed that the negligence of the doctors at the hospital rather than the knife wound he inflicted was the proximate cause of the death and that he should not be held liable for homicide. The Colorado Supreme Court ruled that medical negligence is "too frequent to be considered abnormal" and that the defendant's stabbing of the victim started a chain of events, the natural and probable result of which was the defendant's death. The court added that only the most gross and irresponsible medical negligence is so removed from normal expectations as to be considered unforeseeable.[21]

In *United States v. Hamilton,* the defendant knocked the victim down and jumped on and kicked his face. The victim was rushed to the hospital, where nasal tubes were inserted to enable him to breathe, and his arms were restrained. During the night the nurses changed his bedclothes and negligently failed to reattach the restraints on the victim's arms. Early in the morning the victim went into convulsions, pulled out the nasal tubes, and suffocated to death. The court held that regardless of whether the victim accidentally or intentionally pulled out the tubes, the victim's death was the ordinary and foreseeable consequence of the attack and affirmed the defendant's conviction for manslaughter.[22]

In sum, a defendant who commits a crime is responsible for the natural and probable consequences of his or her actions. A defendant is responsible for foreseeable responsive intervening acts.

The Model Penal Code

The Model Penal Code eliminates legal or proximate causation and requires only "but-for causation." The code merely asks whether the result was consistent with the defendant's intent or knowledge or was within the scope of risk created by the defendant's reckless or negligent act. In other words, under the Model Penal Code, you merely look at the defendant's intent and act and ask whether the result could have been anticipated. In cases of a resulting harm or injury that is "remote" or "accidental" (e.g., a lightning bolt or a doctor who is a serial killer), the Model Penal Code requires that we look to see whether it would be unjust to hold the defendant responsible. [23]

The next two cases, *Banks v. Commonwealth* and *People v. Kern,* ask whether it is just and fair to hold a defendant liable as the legal or proximate cause of the victim's death.

The Legal Equation

Causality	=	Cause in fact	+	legal or proximate cause.
Cause in fact	=	"But for" the defendant's criminal act, the victim would not be injured or dead.		
Legal or proximate cause	=	Whether just or fair to hold the defendant criminally responsible.		
Intervening acts	=	Coincidental intervening acts limit liability where unforeseeable; responsive intervening acts limit liability where unforeseeable and abnormal.		

Was the defendant's act the proximate cause of the victim's death?

Banks v. Commonwealth, *586 S.E.2D 876 (VA. CT. APP. 2003), Opinion by: Clements, J.*

Damon Lynn Banks was convicted in a jury trial of involuntary manslaughter. . . . On appeal, he contends the trial court erred in finding the evidence sufficient to sustain his conviction. We disagree and affirm the conviction. . . .

Facts

The evidence established that in the early morning hours of September 10, 2000, Banks and four other marines, Terrance Jenkins, Francisco Ortez, Khaliah Freeman, and Tory Benjamin, left the Coppermine Club in Petersburg, Virginia. As they walked down Washington Street in the direction of the Howard Johnson Hotel, the victim, Keith Aldrich, came up behind them. The marines stopped so that some of them could urinate, and Aldrich walked past them. The marines began to talk and joke with Aldrich. Aldrich joked back. Benjamin threw a twenty-ounce plastic coke bottle at Aldrich, who thereafter began walking in the middle of the street. Cars coming down the street honked and flashed their lights at him.

As the marines approached the intersection with Interstate 95 (I-95), Aldrich asked them if they were in the army. They told Aldrich they were in the marines, and Aldrich responded that he too was in the marines. Believing Aldrich was lying, Banks stood in front of Aldrich and began to question him about Marine Corps values and the chain of command. Aldrich tried to get around Banks, but Banks got in front of him again. When Aldrich put his hands up, Ortez tackled him and hit him in the face. Aldrich then stumbled and started running down the I-95 off-ramp toward the interstate. Banks ran after Aldrich. Benjamin and Freeman followed Banks, and Ortez and Jenkins remained at the top of the ramp.

Benjamin ran part way down the ramp after Banks. There, he observed Banks standing over Aldrich, who was "all balled up" on the ground in the middle of the road in a fetal position. Benjamin then saw Banks hit Aldrich in the face. At that point, Benjamin saw headlights approaching up the ramp and observed Banks "running to the side of the road." Benjamin started going back up the ramp and then heard a "boom, boom." Turning around, he saw Aldrich had been hit by a car. Benjamin returned to the other marines and told them that Aldrich had been hit by a car. Rejoined by Banks, the group then ran to the Howard Johnson Hotel. None of them contacted the police or called for an ambulance.

At the hotel, Banks admitted to Ortez that he had knocked Aldrich down after chasing him. He also admitted to Benjamin that he had hit Aldrich, saying Aldrich deserved it for lying about being in the marines.

The car that struck Aldrich was driven by Nina Ann Campbell. Campbell testified she was exiting off I-95, going thirty miles an hour, when all of a sudden she saw something "all balled up" in the middle of the off-ramp two feet in front of her. There were no streetlights illuminating the roadway. Observing "it was pitch black" at the time and that she "didn't expect to see anything in the middle of the road," Campbell stated it was too late for her to stop by the time she saw the object in the road, despite her last-second efforts to avoid it. Immediately after hitting Aldrich, Campbell stopped her car, determined that she had run over a body lying on the ramp, and found a nearby policeman.

Dr. William G. Gormley, the medical examiner who performed Aldrich's autopsy, testified that Aldrich, who was found dead at the scene of the accident, sustained severe crushing injuries to his chest and thoracic area and had several abrasions on the side of his body, which Dr. Gormley described as "road burn." Gormley concluded that the cause of death was "multiple blunt-force injuries to the chest" consistent with being run over by a car. Gormley could not give an opinion, based on the autopsy, to confirm whether Aldrich had been assaulted prior to being run over. He did opine, however, that the injuries were consistent with Aldrich being struck by the car while in a reclining position, rather than standing up. On cross-examination, Gormley testified Aldrich had a blood alcohol content of .12 percent. The legal limit for lawfully driving a motor vehicle was .08 percent. Based on this legal limit for intoxication, a general average indicator to correlate the effect of alcohol on judgment, Dr. Gormley said Aldrich's consumption of alcohol was "likely to have had an effect [on his] judgment."

Testifying in his own defense, Banks admitted he got "upset" and "angry" when Aldrich stated he was in the marines. He further admitted that, when chasing Aldrich, he tried to trip him but missed and fell himself. He got up and continued the chase down the ramp. Catching up to Aldrich, Banks "grabbed him and he fell" in the roadway. Banks then hit Aldrich in the face. Leaving Aldrich lying "in the middle of the road," Banks started back up the ramp. He then heard the car strike Aldrich, but did nothing to help the victim and did not call the police.

Issue

Banks contends the evidence was insufficient, as a matter of law, to convict him of involuntary manslaughter. The Commonwealth, he argues, failed to prove beyond a reasonable doubt that his conduct amounted to criminal negligence or that it was the proximate cause of Aldrich's death.

Reasoning

We conclude that assaulting Aldrich and leaving him lying apparently injured on the unlit exit ramp in the

dark, with a vehicle approaching, was conduct so wanton and willful that it showed utter disregard for the safety of human life. Furthermore, a reasonable person would have known that these circumstances would likely lead to Aldrich's injury or death. Accordingly, the evidence proved that Banks' acts of commission and omission rose to the level of criminal negligence.

To convict Banks of involuntary manslaughter, the Commonwealth also had to prove beyond a reasonable doubt that Banks's "criminally negligent acts were a proximate cause of the victim's death." . . .

Banks asserts that notwithstanding his role in the confrontation with Aldrich, the actual causes of Aldrich's death were Ortez's hitting Aldrich, which "sent him running down the expressway ramp"; the negligent driving of Campbell; and Aldrich's own voluntary intoxication. Each of those acts, he maintains, was an independent, intervening cause of the victim's death. Accordingly, he concludes, the Commonwealth failed to prove that his conduct was the proximate cause of Aldrich's death. Again, we disagree.

Banks' argument disregards the applicable principles of proximate cause. To be an intervening cause, the act in question must have been an event that the accused could not have foreseen. "An intervening act which is reasonably foreseeable cannot be relied upon as breaking the chain of causal connection between an original act of negligence and subsequent injury." . . .

It is clear from the evidence in this case that Banks's "negligent acts and omissions exposed [Aldrich] to the subsequent . . . act that ultimately resulted in his death." Indeed, but for Banks's assault on Aldrich, the decedent would not have been lying helpless in the middle of the exit ramp of I-95 at night. Banks himself admitted that, after catching Aldrich, knocking him down, and hitting him in the face while he was on the ground, he left him lying in the middle of the exit ramp.

It is also clear that Ortez hit Aldrich before Banks chased Aldrich down the ramp, assaulted him, and left him lying in the middle of the exit ramp. Thus, Ortez's hitting Aldrich had no bearing on the "chain of causal connection between [Banks's] original acts of negligence and [Aldrich's] subsequent [death]." . . . Hence, Ortez's hitting Aldrich does not constitute an independent, intervening cause.

For Campbell's conduct to constitute an independent, intervening cause, as Banks suggests, Campbell's driving on the exit ramp must have been an event that Banks could not have foreseen. It was readily foreseeable, however, that vehicles traveling on I-95 would use the off-ramp to exit the interstate and that a driver so exiting may not be able to see a "balled up" body in the roadway, because it was dark and the road was not lit.

Therefore, irrespective of whether Ortez's hitting Aldrich or Campbell's driving was criminally negligent or not, the evidence proved that Banks's conduct was a proximate cause of Aldrich's death. He is, thus, criminally liable.

Finally, we find no merit in Banks's argument that Aldrich was to blame for his own death because he ran down a highway exit ramp in an intoxicated condition. The evidence did indicate that Aldrich had a blood alcohol level of .12. However,

> contributory negligence has no place in a case of involuntary manslaughter, [and] if the criminal negligence of the [accused] is found to be the cause of death, [he] is criminally responsible, whether the decedent's failure to use due care contributed to the injury or not. . . . Only if the conduct of the deceased amounts to an independent, intervening act alone causing the fatal injury can the accused be exonerated from liability for his or her criminal negligence. In such case, the conduct of the accused becomes a remote cause.

Here, as discussed above, the evidence makes clear that Banks's negligent acts were not merely a "remote" cause of Aldrich's death. While Aldrich's level of intoxication may have affected his judgment in fleeing down the interstate exit ramp, the record plainly shows that it was Banks's assault that left Aldrich lying in the road to be subsequently hit by an oncoming car.

Holding

For these reasons, we hold the trial court did not err in finding the evidence sufficient, as a matter of law, to prove beyond a reasonable doubt that Banks's conduct amounted to criminal negligence and was a proximate cause of Aldrich's death. Accordingly, we affirm Banks's conviction of involuntary manslaughter.

Questions for Discussion

1. Is this case an example of a coincidental intervening act or a responsive intervening act?
2. Did Aldrich's inebriated condition and confrontation with the marines and running down the highway ramp constitute the legal or proximate cause of his death? Is it possible that he would have been hit by a car without Banks chasing and hitting him?
3. Was Ortez the proximate cause of the victim's death? What about Campbell?
4. Did Banks reasonably believe that Aldrich would get up before he was hit by an oncoming automobile? What would be the result if Banks hit Aldrich and carried him to the side of the road, and Aldrich later wandered onto the street and was killed?
5. Why did the Virginia court convict Banks of negligent rather than reckless homicide?

Compare and contrast Banks *with* People v. Kern.

People v. Kern, *554 N.E.2D 1235 (N.Y. 1990),* Opinion by: Alexander, J.

Facts

Defendants were convicted, after a highly publicized trial, of manslaughter and other charges arising out of their participation in an attack by a group of white teenagers upon three black men in the community of Howard Beach in Queens. This so-called Howard Beach incident occurred during the early morning hours of December 20, 1986, after the three victims, Michael Griffith, Cedric Sandiford, and Timothy Grimes left their disabled car on the nearby Cross Bay Boulevard and walked into the Howard Beach neighborhood to seek assistance.

At the same time that Griffith, Sandiford, and Grimes left their car, a birthday party was being held in Howard Beach and was attended by approximately thirty teenagers, including defendants Kern, Lester, and Ladone, their codefendant Michael Pirone, and the individual who testified against them, Robert Riley. At approximately 12:20 A.M., Kern's girlfriend, Claudia Calogero, left the party and was driven home by Salvatore DeSimone, accompanied by Lester and a fourth youth. As DeSimone turned the corner from Cross Bay Boulevard onto 157th Avenue, Griffith, Grimes, and Sandiford started to cross the street, heading toward the New Park Pizzeria. Calogero testified that three black men darted in front of the car, forcing DeSimone to stop suddenly. An argument ensued between the pedestrians and the occupants of the car. According to Calogero, Sandiford stuck his head into the car window and stared at the teenagers. According to Sandiford's testimony, however, the occupants of the car stuck their heads out of the window and yelled, "N__, get [out of] the neighborhood." Following that confrontation, the three men crossed the street and entered the pizzeria, while the youths continued on their way. After driving Calogero home, DeSimone, Lester, and the other youth returned to the party.

Robert Riley was sitting on the steps outside the house where the party was being held when DeSimone, Lester, and the other youth arrived. Lester shouted "There were some n__s on the boulevard; lets go up there and kill them." A few minutes later, a number of youths, including Kern, Lester, Ladone, and Pirone, left the party to track down the three black men. DeSimone led the caravan of cars from the party to the New Park Pizzeria in his car with Lester and Ladone. Riley followed in his own car with three male teenagers and Laura Castagna, whom Riley intended to escort home. John Saggese followed the group in his car. Although Riley did not know in which car Kern and Pirone traveled, he testified that he observed the two when the group eventually arrived at the pizzeria.

Meanwhile, at approximately 12:45 A.M., Grimes, Sandiford, and Griffith left the New Park Pizzeria. At that point, the cars containing the teenagers pulled into the parking lot and the youths, with the exception of Laura Castagna, emerged from the cars. The group, wielding bats and sticks, confronted Griffith, Grimes, and Sandiford and yelled at them to get out of the neighborhood. Riley testified that Kern was banging a baseball bat on the ground as the teenagers formed a semicircle around the three men, who, according to Riley, were each holding a knife. According to Grimes, several of the youths were carrying bats and sticks, and one youth held "something that looked like an iron pipe." Sandiford testified that he did not have a weapon and that he did not observe whether Griffith or Grimes displayed any weapons. Grimes testified that he pulled out a knife and held it in front of him as the youths approached. At that point, Sandiford was struck in the back by a bat. Although Riley never saw Kern swing the bat that Kern had been holding, he did testify that after Sandiford was struck, Riley grabbed the bat from Kern because he (Riley) could swing it "harder." As Griffith, Grimes, and Sandiford fled across Cross Bay Boulevard, Riley, Kern, Ladone, Lester, Pirone, and several other youths gave chase.

Griffith, Grimes, and Sandiford each ran in a different direction. Grimes headed north on Cross Bay Boulevard and managed to escape his attackers. Sandiford was struck several times with bats and tree limbs as his assailants chanted "N__s, get . . . out of the neighborhood." Sandiford was able to break away from the youths and was eventually joined by Griffith as they ran down an alleyway behind several stores parallel to Cross Bay Boulevard. The two men were followed by Kern, Ladone, Lester, Riley, Pirone, and two other youths. The alleyway ended at a three-foot-high barricade where it intersected with 156th Avenue. Both Sandiford and Griffith jumped over the barricade and made a left turn onto 156th Avenue. The group of teenagers followed approximately thirty feet behind, jumped the barricade, and continued the chase.

At the time, Saggese pulled up in the westbound lane on 156th Avenue, and after clearing the barricade, Riley got into the backseat. The car followed closely behind the youths on foot, who turned right on 90th Street, following Griffith. At the end of 90th Street, a three-foot-high guardrail separated that street from the Belt Parkway, a six-lane highway that runs east and west. Shore Parkway, a service road for the Belt Parkway that also runs east and west, partially intersects 90th Street at the guardrail and leads to Cross Bay Boulevard. The Saggese car, which had pulled ahead of the youths on foot, stopped

three-quarters of the way down 90th Street. Lester ran to the car, grabbed a bat from Riley, and he, Riley, Kern, and Ladone ran toward the end of 90th Street after Griffith. Griffith jumped over the guardrail and ran onto the Belt Parkway. When the youths reached the guardrail, Riley observed Griffith run across the three eastbound lanes of the highway, jump the center median and enter the westbound lanes where he was struck by a car driven by Dominic Blum. Griffith was killed in the accident; his body was thrown a distance approximately 75 to 125 feet, and Blum left the scene without realizing that he had hit a person. He later returned to the scene of the accident and spoke to the police.

After the youths observed Griffith being struck by a car, Lester, Kern, and Ladone ran back toward 156th Avenue where they met up with two other youths. Riley, Pirone, Saggese, and another youth returned in Saggese's car to the pizzeria, where they picked up Castagna and headed toward 156th Avenue.

Sandiford, who had managed to temporarily escape his assailants, was walking west on 156th Avenue when he was attacked from behind by the group of teenagers who beat him with bats and tree limbs. Sandiford testified that he managed to grab the bat being wielded by Lester as he pleaded with Lester not to kill him. At that point, a car pulled up, and, as its occupants approached, Sandiford released the bat, which Lester then swung at him, striking him in the head and causing blood to run down the back of his head. He further testified that he "[felt] like [his] brain . . . busted apart."

Sandiford broke away from his attackers, who continued to chase him. The chase ended when Sandiford tried to climb a chain link fence that ran parallel to the Belt Parkway. The youths pulled Sandiford down from the fence, kicking and beating him with bats and tree limbs. Sandiford cried for help to Theresa Fisher, who was standing in the doorway of a house across the street. In response, Fisher called the police. A tape recording of her 911 call was admitted into evidence at the trial. The beating of Sandiford continued and the final attack was witnessed by George and Marie Toscano, who also called the police.

After his assailants left him, Sandiford was picked up by a police car on the belt Parkway and driven to the site where Griffith's body was located, where he identified the body. He was later taken to the hospital and treated for his injuries. . . .

Issue

We also reject defendants' contentions that the evidence adduced at trial was legally insufficient to support their convictions of second degree manslaughter and first degree assault.

Holding

Viewed in the light most favorable to the people . . . the evidence supports the jury's finding that the defendants recklessly caused Griffith's death, because they were aware of the risk of death to Griffith as they continued to chase him on 90th Street and onto a six-lane highway, they consciously disregarded that risk, and, in so doing, grossly deviated from the standard of care that reasonable persons would have observed under the circumstances. The evidence was also sufficient to support findings that defendants' actions were a "sufficiently direct cause" of Griffith's death, and that although it was possible for Griffith to escape his attackers by turning onto Shore Road rather than attempting to cross the Belt Parkway, it was foreseeable and indeed probable that Griffith would choose the escape route most likely to dissuade his attackers from pursuit. The evidence was sufficient to prove, beyond a reasonable doubt, that Blum's operation of his automobile on the Belt Parkway was not an intervening cause sufficient to relieve defendants of criminal liability for the directly foreseeable consequences of their actions.

The evidence is also legally sufficient to support defendants' conviction of first degree assault. Contrary to defendants' contention . . . the evidence supports the jury's determination that Sandiford suffered "serious physical injury" as a result of their attack upon him. Their determination that Sandiford suffered a "protracted impairment of [his] health" was supported by the testimony of Sandiford and the doctors who treated him that Sandiford suffered severe injuries to his back and right eye that affected him for nearly a year after the incident.

Questions for Discussion

1. Explain why Griffith's running onto the expressway did not constitute an intervening event that was the proximate cause of his death. Is it significant that Griffith chose to escape on Belt Parkway rather than Shore Road?
2. Was Dominic Blum the proximate cause of Griffith's death? If not, can you name the individuals who were the proximate cause of Griffith's death?
3. Is there a meaningful difference between the facts in *Banks* and *Kern?*
4. Was this a hate crime?

Cases and Comments

1. ***Apparent Safety Doctrine.*** Preslar kicked and choked his wife and beat her over the head with a thirty-inch-thick piece of wood. He also threatened to kill her with his axe. The victim gathered her children and walked over two miles to her father's home. Reluctant to reveal her bruises and injuries to her family, she spread a quilt on the ground and covered herself with cotton fabric and slept outside. The combination of the exhausting walk, her injuries, and the biting cold led to a weakened condition that resulted in her death. The victim's husband was acquitted by the North Carolina Supreme Court, which ruled that the chain of causation was broken by the victim's failure to seek safety. The court distinguished this case from the situation of a victim who in fleeing is forced to wade through a swamp or jump into a river. Is it relevant that the victim likely feared that her family would force her to return to her marital home and that she would have to face additional physical abuse from her husband? See *State v. Preslar,* 48 N.C. 421 (1856).

2. ***Drag Racing.*** In *Velasquez v. State,* the defendant Velazquez and the deceased Alvarez agreed to drag race their automobiles over a quarter-mile course on a public highway. Upon completing the race, Alvarez suddenly turned his automobile around and proceeded east toward the starting line. Velazquez also reversed direction. Alvarez was in the lead and attained an estimated speed of 123 mph. He was not wearing a seat belt and had a blood alcohol content of between .11 and .12. Velazquez had not been drinking and was traveling at roughly 90 mph. As both approached the end of the road, they applied their brakes, but Alvarez was unable to stop. He crashed through the guardrail and was propelled over a canal and landed on the far bank. Alvarez was thrown from his car, pinned under the vehicle when it landed, and died. The defendant crashed through the guardrail, landed in the canal, and managed to escape.

A Florida district court of appeal determined that the defendant's reckless operation of his vehicle in the drag race was technically the cause in fact of Alvarez's death under the "but for" test. There was no doubt that "but for" the defendant's participation, the deceased would not have recklessly raced his vehicle and would not have been killed. The court, however, ruled that the defendant's participation was not the proximate cause of the deceased's death because the "deceased, in effect, killed himself by his own volitional reckless driving," and that it "would be unjust to hold the defendant criminally responsible for this death." The race was completed when Alvarez turned his car around and engaged in a "near-suicide mission."

From the point of public policy, would it have been advisable to hold Velazquez liable? Was Alvarez's death foreseeable? See *Velazquez v. State,* 561 So. 2d 347 (Fla. Ct. App. 1990).

3. ***The Year-and-a-Day Rule.*** Defendant Wilbert Rogers stabbed James Bowdery in the heart with a butcher knife on May 6, 1994. During an operation to repair Bowdery's heart, he suffered a cardiac arrest. This led to severe brain damage as a result of a loss of oxygen. Bowdery remained in a coma and died on August 7, 1995, from kidney complications resulting from remaining in a vegetative condition for such a lengthy period of time. Rogers was convicted of second-degree murder and appealed on the grounds that the prosecution was barred by the **year-and-a-day rule**, which prohibits a murder conviction when more than a year has transpired between the defendant's criminal act and the victim's death. The Tennessee Supreme Court observed that the rule was based on the fact that thirteenth-century medical science was incapable of establishing causation beyond a reasonable doubt when a significant amount of time elapsed between the injury to the victim and the victim's death. The rule has also been explained as an effort to moderate the common law's automatic imposition of the death penalty for felonies.

The Tennessee Supreme Court, in abolishing the year-and-a-day rule, noted that almost one-half of the states had now eliminated the rule. The court explained that medical science now possessed the ability to determine the cause of death with greater accuracy and that it no longer made sense to terminate a defendant's liability after a year. In addition, medicine was able to sustain the life of a victim of a criminal act for a lengthy period of time, and the year-and-a-day rule would result in the perpetrators of slow-acting poisons or viruses escaping criminal prosecution and punishment. The court declined to adopt a revised period in which prosecutions for murder must be undertaken and, instead, stressed that prosecutors possessed the burden of establishing causation. The U.S. Supreme Court later ruled that the Tennessee court's abolition of the year-and-a-day rule was not in violation of the *Ex Post Facto* Clause of the U.S. Constitution. See *State v. Rogers,* 992 S.W.3d 393 (Tenn. 1999), *aff'd* 532 U.S. 451 (2001).

Should there be a time limit on prosecutions for homicide? See *Commonwealth v. Casanova,* 708 N.E.2d 86 (Mass. 1999).

You Decide

5.7 Larry Roberts along with other inmates was convicted of the murders of a fellow inmate, Charles Gardner, and of a correctional officer, Albert Path. Gardner was an inmate at the California Medical Facility in Vacaville and was attacked by Roberts and other inmates and was stabbed eleven times. The knife fell to the ground and was grabbed by Gardner, who pursued one of his assailants up a flight of stairs where Gardner plunged the knife into the chest of a prison guard, Officer Patch. Patch died within an hour at the prison clinic. Gardner died shortly thereafter.

It was established that Gardner was dazed and in shock from the loss of blood as he staggered up the stairs and that Patch was the first individual that he encountered. Several witnesses alleged that Roberts had stabbed Gardner. Gardner was described as a well-behaved inmate who had no motive to intentionally kill Patch. Roberts was charged with killing Gardner and claimed that the cause of Gardner's death was medical negligence.

Will this defense prove successful? Should Roberts be held criminally liable for causing the death of Path? See *People v. Roberts,* 826 P.2d. 274 (Cal. 1992).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

The excitement of racing cars along local streets has been part of the rite of passage to adulthood for generations of young people. The adrenalin rush of speed racing was mythologized by Hollywood in the 2001 film *The Fast and the Furious,* which smashed box office records in the opening week. The film takes its place alongside classic films such as *Rebel Without a Cause* (1955) and *American Graffiti* (1973) that portrayed the close connection between American teenagers and their high-performance cars.

In recent years, so-called speed racing or drag racing on local streets and highways has been described by law enforcement as having reached epidemic proportions. These races have evolved from friendly competitions between friends into large-scale events that involve large-scale betting and expensive supercharged racing machines. There is no central database that records arrests for drag racing, but it is estimated that in California alone in 2006, over 6,000 people were arrested for participating in speed racing and that roughly one hundred individuals die each year while participating in races. The California Highway Patrol reports that officers intervened to stop 697 speed contests in 2006; this figure does not include races on local surface streets. Nationally, the National Highway Traffic Safety Administration reports that forty-nine people are injured for every 1,000 individuals who participate in drag racing. The injuries and deaths are concentrated among the young people who are involved in the races.

As early as 2002, the *New York Times* reported that cities and localities were taking extraordinary measures to combat street racing. The *Times* documented the human cost of drag racing over the course of several weeks in Portland, Oregon. Donald Ickes was killed as he was returning home after Christmas shopping for his grandchildren when he was blindsided by a GMC Yukon sport utility vehicle whose driver was speed racing at over seventy-five miles per hour. The driver of the Yukon was a twenty-year-old with a suspended license who had his daughter in the car. Several days later, Krysal Pomante, age eleven, died after her sister's teenaged boyfriend accepted a challenge to race from a passing car and lost control of his vehicle. Two weeks later, Trisha Ann Thorton, nineteen, died after her boyfriend wrapped his car around a street-light pole. The same night two other young women were killed in a car crash resulting from a drag race.

Spectators also are at risk. In 2008, eight spectators were killed in Prince George's County, Maryland, while watching an illegal street race. In August 2008, an automobile ran a red light during a drag race in Phoenix, Arizona, killing the occupant of a third vehicle. A police officer noted that "in a matter of only 20 or 30 seconds [the driver] changed the course of the lives of numerous families. . . . This man, he's 22 years old, his life will never be the same. Obviously the lives of the victims' families will never be the same."

In August 2008, the issue of speed racing took on additional notoriety when Nick Bollea, the seventeen-year-old son of wrestling star Hulk Hogan, was arrested and pled guilty to charges stemming from street racing. Nick's crash of his father's Toyota Supra resulted in the paralysis of his passenger. Bollea, who had been drinking prior to losing control of the auto, was wearing a seat belt and emerged unscathed from the accident.

California has one of the most detailed laws on speed racing. Section 23109 prohibits speed contests in which motor vehicles race against one another or against a clock as well speed exhibitions (e.g. peeling or screeching of tires). Individuals are prohibited from engaging in speed contests or aiding and abetting a contest. Aiding and abetting includes obstructing a highway through the placement of a barrier. Conviction of participation in speed racing may result in imprisonment in a county jail for not less than twenty-four hours nor more than ninety days and a fine of not less than $355 nor more than $1,000, or by both fine and imprisonment. An individual also may be required to perform community service. An individual's license may be suspended or restricted for between nine days and six months. A second offense within five years of a conviction is punishable by a more severe penalty.

Section 23109.1 imposes a term in jail or in state prison on an individual who engages in a speed contest that proximately causes one or more specified injuries, including loss of consciousness, a concussion, bone fractures, protracted loss or impairment of a body function or member, disfigurement, or a wound requiring extensive suturing and causing disfigurement or paralysis. California also provides for the impoundment of vehicles for up to thirty days and the suspension or restriction of an individual's license. Local jurisdictions in California authorize the forfeiture of vehicles, which often are crushed and sold to junkyards. States such as Texas explicitly extend legal liability to spectators at speed races, while Florida imposes criminal responsibility on individuals who knowingly ride as passengers or who collect money related to a race. Speed racing also may lead to prosecution for reckless driving or for manslaughter in the event of death.

The law of criminal responsibility stemming from speed contests was discussed in the Virginia case of *O'Connell v. Commonwealth* (634 S.E.2d 379 (Va. App. 2006)). In February 2004, defendant David O'Connell challenged David Moore to a race. The two drivers' Corvettes were traveling in excess of one hundred miles per hour when Moore's vehicle careened off the highway and struck a tree, killing Moore and his passenger, William Hogan. Both drivers had been drinking prior to the race, and they entered into the race despite the fact that it was rush hour on a weekday afternoon on a busy road adjacent to a residential community. The shoulders of the roads were piled with snow and sand.

Defendant O'Connell argued that he should not be held criminally responsible for the deaths of Moore and Hogan because he had not made contact with Moore's vehicle prior to Moore's loss of control, and that the deaths had resulted from Moore's negligent loss of control of his automobile. O'Connell explained to a police officer that Moore's car had fishtailed in front of him, that he had applied his brakes to avoid hitting Moore, and that as a consequence his car had crashed into the wall at entrance to a subdivision.

Judge Frederick Rockwell III of the Circuit Court of Chesterfield County noted that courts in Florida, Georgia, Oregon, and Pennsylvania have held that the negligence of a competing driver who dies in an auto accident relieves a defendant of criminal liability. Judge Rockwell, however, held that the better reasoned rule is that Moore's negligence "should have been foreseen by both drivers in the reckless circumstances under which they were operating their vehicle" and that under these circumstances, an "intervening act which is reasonably foreseeable cannot be relied upon as breaking the chain of causation." Judge Rockwell held that it was foreseeable that Moore might lose control of his automobile and that Moore's negligence therefore did not relieve O'Connell of criminal liability for homicide. O'Connell would be free of responsibility only in the event that Moore died as a result of an unforeseeable act, such as a storm that forced his vehicle off the road.

Would you hold O'Connell criminally responsible for the deaths of Moore and Hogan in addition to reckless driving and other criminal charges? Should a judge consider the impact of his or her judgment on the willingness of drivers to engage in speed racing? How would you rule in the event that Moore's vehicle killed an innocent child?

Chapter Summary

It is a fundamental principle of criminal law that a criminal offense requires a criminal intent that occurs concurrently with a criminal act. The requirement of a *mens rea,* or the mental element of a criminal act, is based on the concept of "moral blameworthiness." The notion of blameworthiness, in turn, reflects the notion that individuals should be subject to criminal punishment and held accountable only when they consciously choose to commit a crime or to create a high risk of harm or injury.

We cannot penetrate into the human brain and determine whether an individual harbored a criminal intent. In some cases, a defendant may confess to the police or testify as to his or her intent in court. In most instances, prosecutors rely on circumstantial evidence and infer an intent from a defendant's motives and patterns of activity.

The Model Penal Code proposed four levels of *mens rea* or criminal intent. The four in order of severity or culpability are as follows:

- *Purposely.* You aimed and shot the arrow at William Tell with the purpose of killing him rather than with the intent of hitting the apple on his head. (Tell is the national hero of Switzerland who was required to shoot an apple off his son's head.)
- *Knowingly.* You know that you are a poor shot, and when shooting at the apple on William Tell's head, you knew that you were practically certain to kill him.
- *Recklessly.* You clearly appreciated and knew the risk of shooting the arrow at William Tell with your eyes closed. Nevertheless, you proceeded to shoot the arrow despite the fact that this was a gross deviation from the standard of care that a law-abiding person would exhibit.

- *Negligently.* You claim that you honestly believed that you were such an experienced hunter that there was no danger in shooting the apple from William Tell's head. This was a gross deviation from the standard of care that a reasonable person would practice under the circumstances.

Strict liability crimes require only an *actus reus* and do not require proof of a *mens rea*. These offenses typically are public welfare crimes whose creation is meant to protect the safety and security of society by regulating food, drugs, and transportation. These offenses are *mala prohibita* rather than *mala in se* and usually are punishable by a small fine. Strict liability offenses are criticized as inconsistent with the traditional concern with "moral blameworthiness."

A criminal act requires the unison or concurrence of a criminal intent and a criminal act. This means that the intent must dictate the act.

Crimes such as murder, aggravated assault, and arson require the achievement of a particular result. Particularly in the case of homicide, defendants may claim that their act did not cause the victim's death. The prosecution must establish beyond a reasonable doubt that an individual's act was the cause in fact, or "but for" cause, that set the chain of causation in motion. The defendant's act must also be the legal or proximate cause of the death. Normally this is not difficult. Cases involving complex patterns of causation, however, may require judges to make difficult decisions concerning whether it is fair and just to hold an individual responsible for the consequences of intervening acts.

We saw that two types of intervening acts are important in examining the chain of causation:

- A *coincidental intervening act* is unforeseeable and breaks the chain of causation.
- A *responsive intervening act* breaks the chain of causation only when the reaction is both abnormal and unforeseeable.

Chapter Review Questions

1. What is the reason that the law requires a *mens rea?*
2. Why is it difficult to prove *mens rea* beyond a reasonable doubt? Discuss some different ways of proving *mens rea.*
3. Explain the difference between purpose and knowledge. Which is punished more severely? Why?
4. Distinguish recklessness from negligence. Which is punished more severely? Why?
5. What is the difference between a crime requiring a criminal intent and strict liability?
6. Explain the "willful blindness" rule.
7. What is the importance of the principle of concurrence? Provide an example of a lack of concurrence.
8. Disputes over causation typically arise in prosecutions for what types of crimes?
9. Explain the statement that an individual's criminal act must be shown to be both the cause in fact and the legal or proximate cause.
10. What is meant by the statement that legal or proximate cause is based on a judgment of what is just or fair under the circumstances? How does this differ from the determination of a cause in fact or a "but for" analysis?
11. What is the difference between a coincidental intervening act and a responsive intervening act? Provide examples.
12. Discuss the test for determining whether coincidental intervening acts and responsive intervening acts break the chain of causation.
13. Provide concrete examples illustrating a coincidental intervening act and a responsive intervening act that do not break the chain of causation. Now provide examples of coincidental and intervening acts that do break the chain of causation.
14. What is the year-and-a-day rule? Why are states now abandoning this principle?
15. What are the arguments for and against strict liability offenses?
16. What is the approach of the Model Penal Code toward causality? Use some of the cases in the text to illustrate your answer.
17. Are we too concerned with criminal intent? Why not impose the same punishment on criminal acts regardless of an individual's intent? Is the father or mother of a child hit by a car concerned whether the driver was acting intentionally, knowingly, recklessly, or negligently?

Legal Terminology

causation
cause in fact
circumstantial evidence
coincidental intervening act
concurrence
constructive intent
crimes of cause and result
general intent
intervening cause
knowingly
mens rea
negligently
proximate cause
public welfare offense
purposely
recklessly
responsive intervening act
scienter
specific intent
strict liability
transferred intent
willful blindness
year-and-a-day rule

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. In *Staples v. United States* in 1994, the U.S. Supreme Court decided whether the prosecution must establish that a defendant knowingly possessed an unregistered machine gun or whether this is a strict liability offense. Explore the decision and reasoning of the Supreme Court.
2. The Kansas Supreme Court considered whether a defendant is responsible for a death caused by a police officer during a high-speed chase in *State v. Anderson*. In another interesting case, *State v. Pelham* in 2003, a New Jersey court considered whether a defendant was guilty of vehicular homicide when the victim of a car crash was voluntarily removed from life support following the accident. Explain the analysis of the courts in these cases.

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6 Parties to Crime and Vicarious Liability

Did Gometz intend to kill a prison guard?

In the morning, Silverstein, while being escorted from the shower to his cell, stopped next to Randy Gometz's cell, and while two of the escorting officers were for some reason at a distance from him, reached his handcuffed hands into the cell. The third officer, who was closer to him, heard the click of the handcuffs being released and saw Gometz raise his shirt to reveal a home-made knife ("shank")—which had been fashioned from the iron leg of a bed—protruding from his waistband. Silverstein drew the knife and attacked one of the guards, Clutts, stabbing him 29 times and killing him.

Core Concepts and Summary Statements

Parties to a Crime

More than one individual may be liable for a crime.

A. The common law divided parties into principals in the first and second degree and accessories before and after the fact. Modern statutory law provides for two parties to a crime, accomplices and accessories.
B. Individuals participating before and during the crime at common law were guilty of the crime itself. Being an accessory after the fact now is considered a separate, less serious crime.

Actus Reus of Accomplice Liability

The *actus reus* requirement of accomplice liability is satisfied by even a relatively small amount of material or psychological assistance to the perpetrator of the crime. "Mere presence," however, is not sufficient. An exception to the mere presence rule arises when an individual possesses a legal duty to intervene.

Mens Rea of Accomplice Liability

The *mens rea* requirement for accomplice liability requires an intent to assist in the commission of a specific crime. A minority of judges consider that knowledge is sufficient. A small number of courts have recognized that recklessness is sufficient.

Accessory After the Fact

Accessory after the fact requires an intent to prevent or interfere with an offender's arrest, prosecution, or conviction. This is considered a less serious offense than direct involvement in the crime by principals.

Vicarious Liability

An individual is held liable for the acts of another based on the relationship between the two parties. It is typically applied to crimes that do not require a criminal intent.

Corporate Liability

Vicarious liability extends legal responsibility to corporate officers and to corporations in order to encourage executives to monitor and supervise employees.

Traffic Tickets and Vicarious Liability

Owners of automobiles are vicariously liable for traffic tickets based on their legal ownership of the car.

Parents and Vicarious Liability

The vicarious liability of parents for the criminal conduct of their children is based on the parents' legal status and responsibility for their children.

Introduction

Thus far we have established a number of building blocks of criminal conduct. First, there are *constitutional limits* on the government's ability to declare acts criminal. Second, *actus reus* requires that an individual commit a voluntary act or omission. People are punished for what they do, not for what they think or for who they are. Third, the existence of a criminal intent or *mens rea* means that punishment is limited to morally blameworthy individuals. Last, there must be a *concurrence* between a criminal act and a criminal intent. The criminal act must be established as both the *factual cause* and the *legal* or *proximate cause* of a prohibited harm or injury. We now add another building block to this foundation by observing that more than one individual may be liable for a crime. In this chapter we will discuss two situations in which multiple parties are held liable for a crime.

- ***Parties to a Crime* or *Complicity.*** Individuals who assist the perpetrator of a crime before, during, or following the crime are held criminally responsible. *In other words, individuals who assist in the commission of a crime are held liable for the criminal conduct of the perpetrator of the offense.*
- ***Vicarious Liability.*** Individuals may be held liable based on their *relationship* with the perpetrator of a crime. The most common instance involves extending guilt to an employer for the acts of an employee or imposing liability on a corporation for the acts of a manager or employee. Two other instances of vicarious liability are reviewed in this chapter. The first involves holding the owner of an automobile liable for traffic tickets issued to the car despite the fact that the auto may have been driven by another individual. The second entails imposing responsibility on parents for the acts of their children.

In reading cases concerning complicity, you should ask yourself whether the appellant intended to assist and assisted a crime. As a matter of social policy, consider why we punish people who assist another to commit a crime. Should the parties to a crime be subject to the same punishment as the perpetrator? As for vicarious liability, consider whether criminal responsibility should be extended to individuals who were neither present nor involved or perhaps even aware of the crime.

Parties to a Crime

Common law judges appreciated that criminal conduct often involves a range of activities: planning the crime, carrying out the offense, evading arrest, and disposing of the fruits of the crime. The common law divided the participants in a crime into *principals* and **accessories**. Principals were actually present and carried out the crime, while accessories assisted the principals. Holding individuals accountable for intentionally assisting the criminal acts of another is termed *accomplice or accessory liability.*

The four categories of **parties to a crime** under the common law are as follows:

- ***Principals in the First Degree.*** The perpetrator of the crime. For example, the person or persons actually robbing the bank.
- ***Principals in the Second Degree.*** Individuals assisting the robbers. This includes lookouts, getaway drivers, and those disabling burglar alarms. Principals in the second degree are required to be either physically present at the bank or constructively present, meaning that they directly assist the robbery at a distance by engaging in such activities as serving as a lookout.
- ***Accessory Before the Fact.*** Individuals who help prepare for the crime. In the case of a bank robbery, accessories before the fact may purchase firearms or masks, plan the crime, or encourage the robbers. Accessories, in contrast to principals, are neither physically nor constructively present.
- ***Accessory After the Fact.*** Individuals who assist the perpetrators, knowing that a crime has been committed. This includes those who help the bank robbers escape or hide the stolen money.

Both principals and accessories were punishable as felons under the common law. All felonies were subject to the death penalty. Common law judges desired to limit the offenses for which capital

punishment might be imposed, and they developed various rules to frustrate the application of the death penalty. Judges, for instance, held that principals and accessories could be prosecuted only following the conviction of the principal in the first degree. This posed a barrier to prosecution in those instances in which the principal in the first degree was acquitted, fled or died, or in which the principal's conviction was reversed. There were additional requirements that complicated prosecutions, such as the fact that an accessory who assisted a crime while living in another state could be prosecuted only in the state in which the acts of accessoryship occurred. These jurisdictions typically had little interest in prosecuting an accessory for crimes committed outside the state.[1]

Today we are no longer required to overcome these complications. Virtually every jurisdiction has abandoned the common law categories. States typically provide for two parties to a crime:

- ***Accomplices.*** Individuals involved before and during a crime
- ***Accessories.*** Individuals involved in assisting an offender following the crime

For a deeper look at this topic, visit the study site.

Returning to our bank robbery example, the perpetrator of the bank robbery and the individuals planning and organizing the robbery as well as the lookout, the driver of the getaway car, and the individuals disabling the bank guard will all be charged with bank robbery. In the event that the accomplices are convicted, they will receive the same sentence as the perpetrator of the crime.

Individuals who assist the perpetrators following the crime will be charged as accessories after the fact. Accessoryship is no longer viewed as being connected to the central crime. It is considered a separate, minor offense involving the frustration of the criminal justice process, and it is punishable as a misdemeanor. Despite these changes to the law of parties, you will find that common law categories are frequently referred to in judicial decisions and in various state statutes.

Holding an individual liable for the conduct of another seems contrary to the American value of personal responsibility. Why should we punish an individual who drives a getaway car in a bank robbery to the same extent as the actual perpetrator of the crime? The law presumes that the individuals who assisted the robber implicitly consented to be bound by the conduct of the principal in the first degree and, in the words of Joshua Dressler, "forfeited their personal identity." Professor Dressler refers to this as **derivative liability**, in which the accessory's guilt flows from the acts of the primary perpetrator of the crime.[2]

In a later chapter we will discuss *conspiracy,* which is an agreement to commit a crime, such as bank robbery. A defendant may be liable both for an agreement to rob a bank and for the bank robbery itself. This is the so-called ***Pinkerton* rule**, which provides that a conspiracy to commit a crime and the crime itself are separate and distinct crimes. An individual may be charged with one or both of these offenses.[3]

The Statutory Standard

Consider how the Pennsylvania and Texas statutes have modified the common law of parties:

18 Pennsylvania Consolidated Statutes Section 306. Liability for Conduct of Another; Complicity

. . .

(1) General rule—A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) Conduct of another—A person is legally accountable for the conduct of another person when:

. . .

(a) he is an accomplice of such other person in the commission of the offense.

(b) Accomplice defined—A person is an accomplice of another person in the commission of an offense if:

(3) with the intent of promoting or facilitating the commission of the offense, he. . . . aids or agrees to attempt to aid such other person in planning or committing it.

. . .

(4) Prosecution of accomplice only—An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

Texas Penal Code Section 7.01. Parties to Offenses

(1) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(2) Each party to an offense may be charged with commission of the offense.

(3) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

Actus Reus of Accomplice Liability

Statutes and judicial decisions describe the *actus reus* of accomplice liability using a range of seemingly confusing terms such as *aid, abet, encourage,* and *command*. Whatever the terminology, keep in mind that the *actus reus* of accomplice liability is satisfied by even a relatively insignificant degree of material or psychological assistance. In a well-known English case, a journalist bought a ticket to attend and review a concert by American jazz musician Coleman Hawkins and was convicted of encouraging and supporting Hawkins, who had not received permission to perform from British immigration authorities.[4] Consider the range of conduct in the following examples that courts have considered to constitute aiding and abetting a crime and as accomplice liability.[5]

- Two men attacked and broke Clifton Robertson's leg. The men initially approached Robertson's brother-in-law, Carl Brown, who pointed to Robertson. Following the attack, one of the assailants remarked to Brown, "You can pay me now." Brown was found guilty of aggravated assault for inciting, encouraging, or assisting the perpetrators of the assault.[6]
- Guadalupe Steven Mendez was an incarcerated felon who directed Patricia Morgan over the phone to molest and to take nude photos of her fourteen-year-old granddaughter. Mendez was found to have aided and abetted aggravated rape.[7]
- Delfino Alejandres was convicted of aggravated robbery for having encouraged an offense by either word or deed. Alejandres parked his car so as to prevent Peter Pham, a fifteen-year-old fellow high school student, from pulling out of a driveway. Chris Valoretta exited Alejandres's auto and shot Pham when Pham refused to give Valoretta the keys to Pham's automobile. Alejandres and Valoretta then drove away. The evidence indicated that Alejandres and Valoretta were friends and that Alejandres had earlier commented to a fellow student that he was considering "wasting" Pham.[8]
- Donald Jones directed his son Michael to rob Guy Justice, who owed money to Donald. Michael agreed to rob Justice later in the day. The three subsequently met at Andra Wright's house, and Donald asked Michael whether he still planned to rob Justice. Michael demanded that Justice empty his pockets, and during the struggle Donald shouted at Michael to "shoot . . . it's either you or him, you better shoot." Michael responded by shooting Justice in the chest. Donald was convicted of having aided and abetted Michael through his "conduct, presence and companionship."[9]
- Prentiss Phillips was a high-ranking member of the Gangster Disciplines street gang and was convicted of the murder and aggravated kidnapping of Vernon Green, whom he suspected of standing outside of a meeting of the street gang in order to identify members of the Gangster Disciples for the rival Vice Lords. Phillips allegedly ordered gang members to seize Green and watched as Green was dragged upstairs, where he was beaten. Phillips later ordered three gang members to take Green outside and kill him. Phillips was convicted of aiding and abetting the murder and aggravated kidnapping of Green.[10]

It is important to note that although an accomplice must assist in the commission of a crime, there is no requirement that the prosecution demonstrate that the accomplice's contribution was essential to the commission of the crime. This seems to be intended to deter individuals from assisting

in the commission of a crime. Such a rule, of course, may prove unfair, because the punishment of an accomplice who makes a small contribution may be much more severe than he or she actually deserves. The Maine Supreme Court ruled that a defendant who offered to make an automobile available was guilty of being an accomplice to murder despite the fact that the perpetrator carried out the crime without the car.[11] How should a court rule in those instances in which the perpetrator is unaware of the accomplice's effort to assist in the crime? The consensus is that as long as an individual acts with the required intent, he or she will be held liable as an accessory.

In the cases discussed previously, the defendants' acts clearly assisted, encouraged, or incited criminal conduct. The **mere presence rule** provides that being present and watching the commission of a crime is not sufficient to satisfy the *actus reus* requirement of accomplice liability. Why is that? A mere presence is ambiguous. On the one hand, it is sometimes the case that an individual's presence encourages and facilitates a defendant's criminal conduct. On the other hand, silence may indicate disapproval.

Courts have struggled with what action is required for an individual who is present to be considered an accomplice. Judges have ruled that a gang member was not guilty of aiding and abetting when he, along with fifteen or twenty others, chanted the name of the gang while two gang members smashed and beat an automobile containing a member of a rival gang.[12] On the other hand, an Illinois court convicted a gang member who joined a group in chasing a truck and watched as the driver was pulled out of a truck and then silently stood over the driver as a codefendant kicked the victim while another man hit the victim with a bat. The defendant then left the crime scene with the assailants.[13] Is there a clear and meaningful difference in the contribution of these two gang members?

The leading case on the mere presence rule is *Bailey v. United States*. Bailey spent most of the day conversing with his partner and then left to shoot craps while his partner stood across the street near the entrance to the Center Market. Bailey later joined his partner. The two watched as an employee followed his regular routine and exited the market carrying money receipts in a bag. As the employee approached, Bailey retreated to the curb ten feet from his partner, who then seized the deposits at gunpoint. Bailey and his partner then fled, and only Bailey was subsequently apprehended. The District of Columbia Court of Appeals determined that Bailey was innocently talking to his partner when his partner suddenly pulled out a gun and seized the bag of money. The fact that Bailey fled did not mean that he was involved with his partner in either planning or in assisting the crime as a lookout. The court stressed that individuals who are entirely innocent sometimes flee based on a fear of being considered guilty or in order to avoid appearing as a witness.[14]

An exception to the mere presence doctrine arises where defendants possess a duty to intervene. In *State v. Walden,* a mother was convicted of aiding and abetting an assault with a deadly weapon when she failed to intervene to prevent an acquaintance from brutally beating her young son. The North Carolina Supreme Court reasoned that a parent's failure to protect his or her child communicates an approval of the criminal conduct.[15]

The mere presence rule is explored in the next case, *State v. Ulvinen*. This decision also raises the liability of individuals who utter words of approval and the difficulty of determining whether these individuals intend to assist the perpetrator.

Was the defendant an accomplice to the murder of her daughter-in-law?

State v. Ulvinen, *313 N.W.2D 425 (MINN. 1981), Opinion by: Otis, J.*

Issue

Was the appellant properly convicted of first degree murder pursuant to Minnesota Statutes section 609.05, subdivision 1 (1980), imposing criminal liability on one who "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures" another to commit a crime?

Facts

Carol Hoffman, daughter-in-law of appellant Helen Ulvinen, was murdered late on the evening of August 10 or the very early morning of August 11, 1980, by her husband, David Hoffman. She and David had spent an amicable evening together playing with their children,

and when they went to bed David wanted to make love to his wife. However, when she refused him he lost his temper and began choking her. While he was choking her he began to believe he was "doing the right thing" and that to get "the evil out of her" he had to dismember her body.

After his wife was dead, David called down to the basement to wake his mother, asking her to come upstairs to sit on the living room couch. From there she would be able to see the kitchen, bathroom, and bedroom doors and could stop the older child if she awoke and tried to use the bathroom. Appellant didn't respond at first but after being called once, possibly twice, more she came upstairs to lie on the couch. In the meantime David had moved the body to the bathtub. Appellant was aware that while she was in the living room her son was dismembering the body but she turned her head away so that she could not see.

After dismembering the body and putting it in bags, Hoffman cleaned the bathroom, took the body to Weaver Lake, and disposed of it. On returning home he told his mother to wash the cloth covers from the bathroom toilet and tank, which she did. David fabricated a story about Carol leaving the house the previous night after an argument, and Helen agreed to corroborate it. David phoned the police with a missing person report and during the ensuing searches and interviews with the police, he and his mother continued to tell the fabricated story.

On August 19, 1980, David confessed to the police that he had murdered his wife. In his statement he indicated that not only had his mother helped him cover up the crime, but she had known of his intent to kill his wife that night. After hearing Hoffman's statement, the police arrested appellant and questioned her with respect to her part in the cover-up. Police typed up a two-page statement, which she read and signed. The following day a detective questioned her further regarding events surrounding the crime, including her knowledge that it was planned.

Appellant's relationship with her daughter-in-law had been a strained one. She had moved in with the Hoffmans on July 26, 1980—two weeks before the crime—to act as a live-in babysitter for their two children. Carol was unhappy about having her move in and told friends that she hated Helen, but she told both David and his mother that they could try the arrangement to see how it worked.

On the morning of the murder, Helen told her son that she was going to move out of the Hoffman residence, because "Carol had been so nasty to me." In his statement to the police, David reported the conversation that morning as follows:

A: Sunday morning I went downstairs and my mom was in the bedroom reading the newspaper and she had tears in her eyes, and she said in a very frustrated voice, "I've got to find another house." She said, "Carol don't want me here," and she said, "I probably shouldn't have moved in here." And I said then, "Don't let what Carol said hurt you. It's going to take a little more period of readjustment for her." Then I told mom that I've got to do it tonight so that there can be peace in this house.

Q: What did you tell your mom that you were going to have to do that night?

A: I told my mom I was going to have to put her to sleep.

Q: Dave, will you tell us exactly what you told your mother that morning, to the best of your recollection?

A: I said I'm going to have to choke her tonight and I'll have to dispose of her body so that it will never be found. That's the best of my knowledge.

Q: What did your mother say when you told her that?

A: She just—she looked at me with very sad eyes and just started to weep. I think she said something like, "It will be for the best."

David spent the day fishing with a friend of his. When he got home that afternoon, he had another conversation with his mother. She told him at that time about a phone conversation Carol had had in which she discussed taking the children and leaving home. David told the police that during the conversation with his mother that afternoon, he told her, "Mom, tonight's got to be the night."

Q: When you told your mother, "Tonight's got to be the night," did your mother understand that you were going to kill Carol later that evening?

A: She thought I was just kidding her about doing it. She didn't think I could.

Q: Why didn't your mother think that you could do it?

A: Because for some time I had been telling her I was going to take Carol scuba diving and make it look like an accident.

Q: And she said?

A: And she always said, "Oh, you're just kidding me."

Q: But your mother knew you were going to do it that night?

A: I think my mother sensed that I was really going to do it that night.

Q: Why do you think your mother sensed you were really going to do it that night?

A: Because when I came home and she told me what had happened at the house, and I told her, "Tonight's got to be the night," I think she said, again I'm not certain, "that it would be the best for the kids."

Reasoning

It is well settled in this state that presence, companionship, and conduct before and after the offense are circumstances from which a person's participation in the criminal intent may be inferred. The evidence is undisputed that appellant was asleep when her son choked his wife. She took no active part in the dismembering of the body but came upstairs to intercept the children, should they awake, and prevent them from going into the bathroom. She cooperated with her son by cleaning some items from the bathroom and corroborating David's story to prevent anyone from finding out about the murder. She is insulated by statute from guilt as an accomplice after the fact for such conduct because of her relation as a parent of the offender. The jury might well have considered appellant's conduct in sitting by while her son dismembered his wife so shocking that it deserved punishment. Nonetheless, these subsequent actions do not succeed in transforming her behavior prior to the crime to active instigation and encouragement. Minnesota Statutes section 609.05, subdivision 1 (1980) implies a high level of activity on the part of an aider and abettor in the form of conduct that encourages another to act. Use of terms such as *aids, advises,* and *conspires* requires something more of a person than mere inaction to impose liability as a principal.

Holding

The evidence presented to the jury at best supports a finding that appellant passively acquiesced in her son's plan to kill his wife. The jury might have believed that David told his mother of his intent to kill his wife that night and that she neither actively discouraged him nor told anyone in time to prevent the murder. Her response that "it would be the best for the kids" or "it will be the best" was not, however, active encouragement or instigation. There is no evidence that her remark had any influence on her son's decision to kill his wife. The Minnesota statute imposes liability for actions that affect the principal, encouraging him to take a course of action that he might not otherwise have taken. The State has not proved beyond a reasonable doubt that appellant was guilty of anything but passive approval. However morally reprehensible it may be to fail to warn individuals of their impending death, our statutes do not make such an omission a criminal offense.

David told many people besides appellant of his intent to kill his wife, but no one took him seriously. He told a co-worker approximately three times a week that he was going to murder his wife and confided two different plans for doing so. Another co-worker heard him tell his plan to cut Carol's air hose while she was scuba diving, making her death look accidental, but did not believe him. Two or three weeks before the murder, David told a friend of his that he and Carol were having problems, and he expected Carol "to have an accident sometime." None of these people has a duty imposed by law to warn the victim of impending danger, whatever their moral obligation may be. The State has not proved beyond a reasonable doubt that appellant was guilty of any of the activities enumerated in the statute. Appellant's comment is not sufficient additional activity on her part to constitute planning or conspiring with her son. She did not offer advice on how to kill his wife, nor offer to help him. She did not plan when to accomplish the act or tell her son what to do to avoid being caught. She was told by her son that he intended to kill his wife that night and responded in a way that, while not discouraging him, did not aid, advise, or counsel him to act as he did. Where, as here, the evidence is insufficient to show beyond a reasonable doubt that appellant was guilty of active conduct sufficient to convict her of first degree murder . . . her conviction must be reversed.

Questions for Discussion

1. What facts did the prosecutor likely rely on to establish Ms. Ulvinen's guilt? What facts would the defense attorney rely on in urging her acquittal? Why did the Minnesota Supreme Court reverse Ms. Ulvinen's conviction?
2. Does Ms. Ulvinen's behavior following Carol Hoffman's murder indicate that she approved of Carol's killing? Does Ms. Ulvinen's involvement in covering up the crime indicate that she shared her son's intent to kill Carol Hoffman?
3. Is it significant that Ms. Ulvinen took the initiative in informing David that she was not getting along with Carol and that Carol planned to leave with the children? What of Ms. Ulvinen's response that killing Carol would be beneficial for the children? How do Ms. Ulvinen's comments to David on the day of the killing differ from her earlier responses to David's statements that he intended to kill Carol? Is it significant that David killed Carol only following his conversation with his mother? Was the court correct in characterizing Ms. Ulvinen as passive?
4. Did Ms. Ulvinen have a duty to protect her daughter-in-law, the mother of her grandchildren?
5. Why does the statute exempt a parent from liability for accessory after the fact?
6. Draft your own one-page opinion in this case.

Cases and Comments

The Mere Presence Rule. The four- or five-year-old victim lived with her mother, Holly Swanson-Birabent, for a year while in kindergarten. On one occasion, the victim wandered into her mother's bedroom and observed her

mother sexually engaged with her boyfriend, Don Umble. The victim got into the bed with her mother and Umble and fell asleep. At some point, Umble woke up the victim and molested her. The defendant stood to the side of the bed watching silently. Swanson-Birabent then entered the bed, and her daughter returned to her own bedroom. The same series of events was repeated on another occasion. The California appellate court determined that the defendant was aware of what was occurring, because there was light from the street shining through the window, and the sheet was sufficiently thin to reveal what was transpiring. The appellate court concluded that the defendant engaged in an "act" sufficient to constitute aiding and abetting in that the "defendant was not merely present. Her presence served an important purpose: it encouraged the victim to comply with Umble rather than resist . . . [and] also encouraged Umble to continue molesting the victim." In addition, the court concluded that Swanson-Birabent failed to fulfill her duty as a parent to protect her daughter from molestation. This failure to act both encouraged the "victim to comply with Umble rather than resist, and . . . encouraged Umble to continue molesting the victim." The appellate court affirmed Swanson-Birabent's conviction of two counts of committing a lewd or lascivious act on a child under the age of fourteen. See *People v. Holly Swanson-Birabent,* 7 Cal. Rptr. 3d 744 (Cal. App. 2003).

You Decide

6.1 A woman entered a bar in New Bedford, Massachusetts, in March 1983, in order to purchase cigarettes. As she started to leave, she was knocked to the ground by two men who tore off her clothing, and for the next seventy-five minutes she was forced to commit various sexual acts, which she resisted. The victim cried for help, but the sixteen men in the bar yelled, laughed, and cheered. No one came to her assistance. Were all fifteen male customers and male bartender accomplices to the sexual attack? Various procedural issues are discussed in *Commonwealth v. Cordeiro,* 519 N.E.2d 1328 (Mass. 1988), and *Commonwealth v. Vieira,* 519 N.E.2d 1320 (Mass. 1988).

You can find the answer at www.sagepub.com/lippmanccl2e

Mens Rea of Accomplice Liability

A conviction for accomplice liability requires that a defendant both assist and intend to assist the commission of a crime. In *People v. Perez,* the defendant, Victor Perez, encountered a group of individuals on the street. Victor was not a member of a gang and was unaware that several of the individuals were affiliated with the Maniac Latin Disciples and that they were confronting Victor's former acquaintance, Pedro Gonzalez. Victor was unaware that the Maniac Latin Disciples alleged that Pedro had taunted them by displaying hand signs of the rival Latin Kings. In an effort to defend himself when they asked Victor whether Pedro was a member of the Latin Kings, Victor responded that he knew that Pedro had been a member of the Kings, but was uncertain whether he still was a member. Pedro was immediately shot and killed. An Illinois appellate court concluded that the defendant lacked the requisite criminal intent to be held liable for first-degree murder. What intent was required? Would it have been sufficient for Victor to know that Pedro might be killed if Victor identified him? Or was it necessary that Victor intended to assist in Pedro's death?[16]

There is a lack of agreement over the required *mens rea* for accomplice liability. In most cases, an accomplice is required to intend or possess the purpose that an individual commit a specific crime. This is described as *dual intents:*

- the intent to assist the primary party, and
- the intent that the primary party commit the offense charged.[17]

The requirement of purposeful conduct was articulated in the decision of Judge Learned Hand in *United States v. Peoni.* Peoni sold counterfeit money to Regno in the Bronx. The money later was sold to Dorsey, who was arrested attempting to pass the money in Brooklyn. Peoni was charged with aiding and abetting Dorsey's possession of counterfeit money.

Judge Hand recognized that Joseph Peoni was aware that Regno would sell the money to another individual and that the money then would be circulated in the economy. Hand, however, ruled that Peoni's "mere knowledge" was not sufficient to hold him liable for aiding and abetting. Peoni was required to "associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." Hand stressed that Peoni

had to possess a "purposive attitude" that Regno sell the money on the street. Peoni, however, once having sold the money to Regno, had no real interest in whether the money was circulated.[18]

In other words, an individual will not be held liable as an accomplice for knowingly rather than purposely

- selling a gun to an individual who plans to rob a bank.
- renting a room to someone who plans to use the room for prostitution.
- repairing the car of a stranded motorist who intends to use the auto to rob a bank.

Some judges have ruled that the *mens rea* requirement for accomplice liability in the case of serious crimes is satisfied by knowledge of a defendant's criminal plans. In *Backun v. United States,* Max Backun sold stolen silver to Zucker in New York and was aware that Zucker intended to sell the silver in various southern states. Backun's conviction as an accomplice to Zucker's transporting stolen merchandise in interstate commerce was affirmed by a federal court on the grounds that the

> seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator . . . by the plea that he has merely made a sale of merchandise.[19]

Regardless of whether a "purposive" or "knowledge" standard is employed, an accomplice is subject to the **natural and probable consequences** doctrine. This provides that a person encouraging or facilitating the commission of a crime will be held liable as an accomplice for the crime he or she aided and abetted as well as for crimes that are the natural and probable outcome of the criminal conduct. Two issues arise: What crimes are the natural and probable consequence of a criminal act? Should an accomplice be held liable for crimes he or she did not intend to assist or knowingly assist?

The next case in the chapter, *United States v. Fountain,* explores the best approach to determining the *mens rea* for complicity. Ask yourself whether Judge Richard Posner relied on a "purpose" or "knowledge" standard for aiding and abetting. What approach do you favor?

The Statutory Standard

New York punishes knowingly assisting a crime as criminal facilitation and treats this as a less serious offense than the crime that the defendant facilitated. A separate statute addresses accomplice liability. Note the differing intent standards.

New York Section 115.00. Criminal Facilitation in the Fourth Degree

> A person is guilty of criminal facilitation in the fourth degree when, believing it probable that he or she is rendering aid
>
> (1) to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony. . . .
>
> . . .
>
> Criminal facilitation in the fourth degree is a Class A misdemeanor.

New York Section 20.00. Criminal Liability for Conduct of Another

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in criminal conduct.

Model Penal Code

Section 2.06. Liability for Conduct of Another; Complicity

. . .

(1) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) aids or agrees or attempts to aid such other person in planning or committing it, or

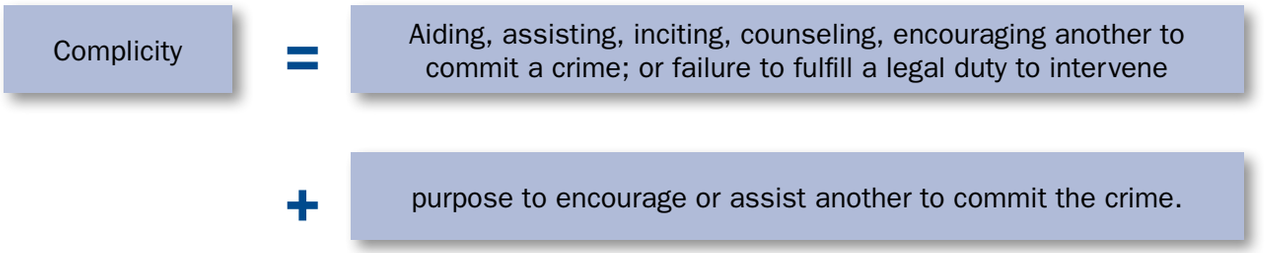
(ii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity. . . .

. . .

(2) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted . . .

The Legal Equation



Did Gometz aid and abet the killing of the prison guard?

UNITED STATES v. FOUNTAIN, *768 F.2D 790 (7TH CIR. 1985), OPINION BY: POSNER, J.*

We have consolidated the appeals in two closely related cases of murder of prison guards in the control unit of the federal penitentiary at Marion, Illinois—the maximum-security cell block in the nation's maximum-security federal prison—by past masters of prison murder, Clayton Fountain and Thomas Silverstein.

Facts

Shortly before these crimes were committed, Fountain and Silverstein, both of whom were already serving life sentences for murder, had together murdered an inmate in the control unit of Marion, and had again been sentenced to life imprisonment. After that, Silverstein killed another inmate, pleaded guilty to that murder, and received his third life sentence. At this point Fountain and Silverstein had each killed three people (for one of these killings, however, Fountain had been convicted only of voluntary manslaughter. And Silverstein's first murder conviction was reversed for trial error, and a new trial ordered, after the trial in this case). The prison authorities—belatedly, and as it turned out ineffectually—decided to take additional security measures. Three guards would escort Fountain and Silverstein (separately), handcuffed, every time they left their cells to go to or from the recreation room, the law library, or the shower (prisoners in Marion's control unit are confined, one to a cell, for all but an hour or an hour and a half a day, and are

fed in their cells). But the guards would not be armed; nowadays guards do not carry weapons in the presence of prisoners, who might seize the weapons.

The two murders involved in these appeals took place on the same October day in 1983. In the morning, Silverstein, while being escorted from the shower to his cell, stopped next to Randy Gometz's cell, and while two of the escorting officers were for some reason at a distance from him, reached his handcuffed hands into the cell. The third officer, who was closer to him, heard the click of the handcuffs being released and saw Gometz raise his shirt to reveal a home-made knife ("shank")—which had been fashioned from the iron leg of a bed—protruding from his waistband. Silverstein drew the knife and attacked one of the guards, Clutts, stabbing him 29 times and killing him. While pacing the corridor after the killing, Silverstein explained that "this is no cop thing. This is a personal thing between me and Clutts. The man disrespected me and I had to get him for it." Having gotten this off his chest he returned to his cell.

Fountain was less discriminating. While being escorted that evening back to his cell from the recreation room, he stopped alongside the cell of another inmate (who, however, apparently was not prosecuted for his part in the events that followed) and reached his handcuffed hands into the cell, and when he brought them out he was out of the handcuffs and holding a shank. He attacked all three guards, killing one (Hoffman) with multiple stab wounds (some inflicted after the guard had already fallen), injuring another gravely (Ditterline, who survived but is permanently disabled), and inflicting lesser though still serious injuries on the third (Powles). After the wounded guards had been dragged to safety by other guards, Fountain threw up his arms in the boxer's gesture of victory, and laughing walked back to his cell.

A jury convicted Fountain of first-degree murder and of lesser offenses unnecessary to go into here. The judge sentenced him to not less than 50 nor more than 150 years in prison and also ordered him, pursuant to the Victim and Witness Protection Act of 1982 . . . to make restitution of $92,000 to Hoffman's estate, $98,000 to Ditterline, and nearly $300,000 to the Department of Labor. . . .

Silverstein and Gometz were tried together (also before a jury, and before the same judge who presided at Fountain's trial) for the murder of Clutts, and both received the same 50- to 150-year sentences as Fountain and were ordered to pay restitution to Clutts's estate and to the Department of Labor of $68,000 and $2,000 respectively. Fountain and Silverstein are now confined in different federal prisons, in what were described at argument as "personalized" cells. . . .

Issue

Gometz argues that the evidence was insufficient to convict him of aiding and abetting Silverstein in murdering Clutts. This argument requires us to consider the mental element in "aiding and abetting." . . . Under the older cases . . . it was enough that the aider and abettor knew the principal's purpose. Although this is still the test in some states, after the Supreme Court adopted Judge Learned Hand's test—that the aider and abettor "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed," . . . it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating . . . the federal aider and abettor statute. But . . . there is support for relaxing this requirement when the crime is particularly grave. . . .

Reasoning

In *People v. Lauria,* 59 Cal. Rptr. 628, 634 (1967)—not a federal case, but illustrative of the general point—the court, en route to holding that knowledge of the principal's purpose would not suffice for aiding and abetting of just any crime, said it would suffice for "the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use." Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish the elements of Judge Hand's test. Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime. We hold that aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used. . . .

Holding

Gometz argues that there is insufficient evidence that he knew why Silverstein wanted a knife. We disagree. The circumstances make clear that the drawing of the knife from Gometz's waistband was prearranged. There must have been discussions between Silverstein and Gometz. Gometz must have known through those discussions or others that Silverstein had already killed three people in prison—two in Marion—and while this fact could not be used to convict Silverstein of a fourth murder, it could ground an inference that Gometz knew that Silverstein wanted the knife in order to kill someone. If Silverstein had wanted to conceal it on his person in order to take it back to his cell and keep it there for purposes of intimidation, escape, or self-defense (or carry it around concealed for any or all of these purposes), he would not have asked

Gometz to release him from his handcuffs (as the jury could have found he had done), for that ensured that the guards would search him. Since the cuffs were off before Silverstein drew the shank from Gometz's waistband, a reasonable jury could find beyond a reasonable doubt that Gometz knew that Silverstein, given his history of prison murders, could have only one motive in drawing the shank and that was to make a deadly assault. . . .

Questions for Discussion

1. Judge Richard Posner states that it is sufficient that the aider and abettor "knew the principal's purpose" and contrasts this with an intent to "bring about" a crime. Explain the difference between these two approaches to intent using the facts in *Fountain* to illustrate your answer.
2. What was Gometz's intent in providing the shank to Fountain? Would Gometz have been convicted under either a purpose or knowledge standard?
3. Do you agree with Judge Posner that a knowledge standard should be employed for more serious offenses in order to deter criminal activity? Would such a test cause difficulties for businesses selling goods to the public?

You Decide

6.2 Mark Manes, twenty-two, met Eric Harris, a seventeen-year-old student at Columbine High School in Littleton, Colorado, at a gun show. Manes purchased a semiautomatic handgun for Harris and accompanied Harris to a target range. After hitting a target, Harris excitedly proclaimed that this could have been someone's brain. Several months later, Manes sold Harris one hundred rounds of ammunition for $25. The next day, Harris and Dylan Klebold entered Columbine High School and killed twelve students and a teacher and then took their own lives. Harris and Klebold left a tape recording thanking Manes for his help and urged that he not be arrested, because they would have eventually found someone willing to sell them guns and ammunition.

As a prosecutor, would you charge Manes as an accomplice to the murders? To the suicides? What if Harris and Klebold arrived at the school armed with weapons and ammunition provided by Manes but used other weapons to kill? What if they left the weapons and ammunition provided by Manes at home? See Joshua Dressler, *Cases and Materials on Criminal Law,* 3rd ed. (St. Paul, MN: West Publishing, 2003), p. 886.

You can find the answer at www.sagepub.com/lippmanccl2e

In reading *State v. Linscott,* ask yourself whether the natural and probable consequence doctrine unfairly punishes defendants who have merely acted negligently.

Is Linscott an accomplice to murder?

State v. Linscott, *520 A.2D 1067 (1987),* Opinion by: Scolnik, J.

William Linscott appeals from a judgment . . . convicting him of one count of murder and one count of robbery. He contends that his conviction of intentional or knowing murder as an accomplice under the accomplice liability statute, 17-A Maine Revised Statutes Annotated (MRSA) section 57(3)(A) (1983), violated his constitutional right to due process of law in that he lacked the requisite intent to commit murder. We find no merit in the defendant's argument and affirm the judgment.

Facts

On December 12, 1984, the defendant, then unemployed, and two other men—the defendant's stepbrother, Phillip Willey, and Jeffrey Colby—drove from his trailer in Belmont, Maine, to the house of a friend, Joel Fuller. Fuller, with a sawed-off shotgun in his possession, joined the others. The defendant drove to the residence of Larry Ackley, where Fuller obtained twelve-gauge shotgun shells.

Later that evening, Fuller suggested that the four men drive to the house of a reputed cocaine dealer, Norman Grenier of Swanville, take Grenier by surprise, and rob him. The defendant agreed to the plan, reasoning that Grenier, being a reputed drug dealer, would be extremely reluctant to call the police and request they conduct a robbery investigation that might result in the discovery of narcotics in his possession. Fuller stated that Grenier

had purchased two kilograms of cocaine that day and that Grenier had been seen with $50,000 in cash. Fuller guaranteed the defendant $10,000 as his share of the proceeds of the robbery.

The four drove up to Grenier's house, which was situated in a heavily wooded rural area on a dead-end road in Swanville. The defendant and Fuller left the car and approached the house. The defendant carried a hunting knife and switchblade, and Fuller was armed with the shotgun. Willey and Colby drove off in the defendant's car and returned later for the defendant and Fuller.

The defendant and Fuller walked around to the back of Grenier's house. At that time, Grenier and his girlfriend were watching television in their living room. The defendant and Fuller intended to break in the back door in order to place themselves between Grenier and the bedroom, where they believed Grenier kept a loaded shotgun. Because the back door was blocked by snow, the two men walked around to the front of the house. Under their revised plan, the defendant was to break the living room picture window, whereupon Fuller would show his shotgun to Grenier, who presumably would be dissuaded from offering any resistance.

The defendant subsequently broke the living room window with his body without otherwise physically entering the house. Fuller immediately fired a shot through the broken window, hitting Grenier in the chest. Fuller entered the house and then left through the broken window after having removed about $1,300 from Grenier's pants pocket, later returning to the house to retrieve an empty shotgun casing. The two men returned to the road and waited behind a bush for the return of the car. The defendant and Fuller were later dropped off at Fuller's house, where both men burned several articles of their clothing. Fuller gave the defendant $500, presumably from the money stolen from Grenier.

On March 27, 1985, the defendant was indicted on one count of murder and one count of robbery. At a jury-waived trial, which commenced on January 6, 1986, the defendant testified that he knew Fuller to be a hunter and that it was not unusual for Fuller to carry a firearm with him, even at night. He nevertheless stated that he had no knowledge of any reputation for violence that Fuller may have had. The defendant further testified that he had no intention of causing anyone's death in the course of the robbery.

At the completion of the trial on January 8, 1986, the trial justice found the defendant guilty of robbery and, on a theory of accomplice liability, found him guilty of murder. The court specifically found that the defendant possessed the intent to commit the crime of robbery, that Fuller intentionally or at least knowingly caused the death of Grenier, and that this murder was a reasonably foreseeable consequence of the defendant's participation in the robbery. However, the court also found that the defendant did not intend to kill Grenier and that the defendant probably would not have participated in the robbery had he believed that Grenier would be killed in the course of the enterprise.

Issue

The sole issue raised on appeal is whether the defendant's conviction pursuant to the . . . accomplice liability statute unconstitutionally violates his right to due process under article I section 6-A of the Maine Constitution and the Fourteenth Amendment of the U.S. Constitution. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. The defendant contends that the accomplice liability statute impermissibly allows the State to find him guilty of murder, which requires proof beyond a reasonable doubt that the murder was committed either intentionally or knowingly, without having to prove either of these two culpable mental states. Instead, the defendant argues, the accomplice liability statute permits the State to employ only a mere negligence standard in convicting him of murder in violation of his right to due process. We find the defendant's argument to be without merit.

Reasoning

17-A MRSA section 57(3)(A) (1983) provides that a person is an accomplice of another in the commission of a crime if "with the intent of promoting or facilitating the commission of the crime he . . . aids or agrees to aid or attempts to aid such other person in planning or committing the crime." A person is an accomplice under this subsection to any crime the commission of which was a "reasonably foreseeable consequence of his conduct." . . . The history of the statute demonstrates that the legislature indeed intended to impose liability upon accomplices for those crimes that were the reasonably foreseeable consequence of their criminal enterprise, notwithstanding an absence on their part of the same culpability required for conviction as a principal to the crime.

Holding

Accordingly, we have stated that section 57(3)(A) is to be interpreted as follows: Under the first sentence of that section, which is to be read independently of the second sentence, liability for a "primary crime" . . . [here, robbery] is established by proof that the actor intended to promote or facilitate that crime. Under the second sentence, liability for any "secondary crime" . . . [here, murder] that may have been committed by the principal is established upon a two-fold showing: (a) that the actor intended to promote the primary crime and (b) that the commission of the secondary crime was a "foreseeable consequence" of the actor's participation in the primary crime.

Questions for Discussion

1. What was the defendant Linscott's intent? Is it fair to hold Linscott liable for Fuller's intentional killing of Grenier? What if Linscott did not know that Fuller was armed with a firearm, and Fuller unexpectedly pulled out the gun and killed Grenier?
2. Would it have been foreseeable that while speeding away from the crime scene, the defendant's escape vehicle would travel at an excessive rate of speed and hit a young child crossing the street?
3. Was Linscott being punished for the intentional killing of another based on mere negligence? What is the purpose of the "foreseeable consequence" rule? Why not limit the murder charge to Fuller? Would Willey and Colby be liable as accomplices to the killing of Grenier?

You Decide

6.3 Peppi Miller was arrested for drug possession and agreed to serve as an informant for the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Miller was given $400 by agents and arranged to illegally purchase a handgun from Tony Roy. Roy served as lookout while Miller met with Steve Ross. Ross handed Miller a gun and then demanded that Miller return the firearm. Ross then pointed a loaded revolver at Miller's head and ordered Miller to drop the money on the ground. The police responded to Miller's distress signal and quickly arrested Ross.

The District of Columbia Court of Appeals concluded that Roy intended the firearm to be sold to Miller and there was no indication that Roy planned or possessed advance knowledge of the robbery. Would Roy be liable for the robbery based on the fact that this was the natural and probable consequence of aiding and abetting the selling of the handgun to Miller? The District of Columbia court recognized that perhaps Roy should have known that it was conceivable that Ross might rob Miller. This, however, was not the same as asserting that the robbery would follow in the ordinary course of events or that it was the natural and probable consequence of selling the handgun. The court stressed that this test "presupposes an outcome within a reasonably predictive range."

Do you agree with this judgment? Does every illegal drug transaction or sale of an illegal firearm involve the natural and probable likelihood of an armed robbery? See *Roy v. United States,* 652 A.2d 1098 (D.C. Ct. App. 1995).

You can find the answer at www.sagepub.com/lippmanccl2e

You Decide

6.4 The defendant, Jacqueline Annette Williams, and Fedell Caffey had been dating for two years. Williams and Caffey had unsuccessfully attempted to conceive a child. Caffey is described as wanting "a baby boy with light skin so that the baby would resemble him."

Williams's cousin, Lavern Ward, was angry with Debra Evans with whom he had a two-year-old child, Jordan. Williams, Caffey, and Ward met and visited Debra, who was pregnant by Ward with her fourth child, who was to be named Elijah. Williams was aware that Ward and Caffey wanted to talk to Evans about the unborn baby and to "teach her a lesson."

Williams was in the bathroom when she heard a loud noise. She emerged to see Caffey standing over Evans with a small automatic gun while Ward appeared to be stabbing her in the neck. Williams stood next to Caffey as he used poultry shears to cut across Evans's abdomen and to remove a male child from Evans's womb and cut the umbilical cord. Caffey stated that he did not want the baby because he believed that the infant boy was dead. Williams blew into Elijah's nose and mouth, and he began breathing.

Caffey and Ward went into a bedroom where they killed ten-year-old Samantha. Seven-year-old Joshua began crying, and Williams put him in a car with Caffey and Ward, and they dropped him at a friend's house. They learned that Joshua had talked about the murders, and the next day Williams and Caffey drove Joshua to a suburban location where Caffey stabbed him to death. Williams left the body in an alley and discarded the sheet in which Joshua was wrapped. The killing occurred on November 19, and Evans was scheduled to be admitted to the hospital to give birth on November 20. Williams, for several months prior to the murders, represented that she was pregnant and later claimed that Elijah was her son.

The defendant argued that she did not inflict injuries on Evans or Samantha and that she should not be held liable as an accomplice. Williams was convicted and sentenced to death. Do you agree that Williams possessed the required criminal intent to be held liable for Evans's and Samantha's murders? For Joshua's murder? See *People v. Williams,* 739 N.E.2d 455 (Ill. App. 2000).

You can find the answer at www.sagepub.com/lippmanccl2e

For an international perspective on this topic, visit the study site.

Accessory After the Fact

The Common Law

Conviction as an accessory after the fact at common law required that a defendant conceal or assist an individual whom he or she knew had committed a felony in order to hinder the perpetrator's arrest, prosecution, or conviction. For example, an individual would be held liable for assisting a friend whom he or she knew killed a member of an opposing gang to flee to a foreign country.

Accessories after the fact at common law were treated as accomplices and were subject to the same punishment as the principal who committed the offense. A wife, however, could not be held liable as an accessory after the fact because it was expected that she assisted her husband.

The Elements of Accessory After the Fact

The elements of accessory after the fact are as follows:

- *Commission of a Felony.* There must be a completed felony. The crime need not have been detected or formal charges filed.
- *Knowledge.* The defendant must possess knowledge that the individual whom he or she is assisting has committed a felony. A reasonable but mistaken belief does not create liability. In *Wilson v. State,* the defendant was speaking with Mendez and Valentine outside a convenience store. Valentine later followed Mendez back to Mendez's trailer and took two gold chains from Mendez's neck. Mendez and three others chased, apprehended, and struggled with Valentine. Wilson was driving by the altercation and intervened to defend Valentine. The Florida Court of Appeals ruled that there was no evidence that Wilson was aware of the robbery and that he had not intended to assist Valentine after the fact.[20]
- *Affirmative Act.* The accessory must take affirmative steps to hinder the felon's arrest; a refusal or failure to report the crime or to provide information to the authorities is not sufficient. Examples of conduct amounting to accessoryship after the fact are hiding or helping a felon escape, destroying evidence, or providing false information to the police in order to mislead law enforcement officials. In *Melahn v. State,* the defendant was acquitted by a jury that accepted his testimony that he let his roommate drive his automobile, he fell asleep, and as a result, he was unaware that his roommate had burglarized a pet store. The Florida court further ruled that Melahn's refusal to cooperate with the police was not sufficient to establish accessoryship after the fact, which requires a false statement to the police.[21]
- *Criminal Intent.* The defendant must provide assistance with the intent or purpose of hindering the detection, apprehension, prosecution, conviction, or punishment of the individual receiving assistance. In *State v. Jordan,* Kenneth Jordan shot Pendley after seeing Pendley talking to Teresa Jordan, Kenneth Jordan's wife. Teresa was convicted of being an accessory after the fact based on her falsely reporting to friends, nurses, and the police and testifying at trial that Pendley had been shot while attempting to rape her. Kenneth Jordan pled guilty to the voluntary manslaughter of Pendley prior to Teresa's conviction.[22]

The modern view is that because accessories after the fact are involved following the completion of a crime, they should not be treated as harshly as the perpetrator of the crime or accomplices. Accessories after the fact are now held liable for a separate, less serious felony or for a misdemeanor. Some states have abandoned the crime of accessory after the fact and have created the new offense of "hindering prosecution," which punishes individuals frustrating the arrest, prosecution, or conviction of individuals who have committed felonies as well as misdemeanors.

Most states have abandoned the common law requirements that frustrated the conviction of individuals for accessoryship after the fact. A spouse is no longer immune in most states from prosecution for being an accessory after the fact. The common law rule that an individual may be prosecuted only for being an accessory after the fact following the conviction of the principal has also been modified. Most states require only proof of a completed felony.

Modern statutes increasingly follow the Model Penal Code and list the specific types of assistance that are prohibited. Other statutes retain the common law language and look to courts to define the acts constituting the offense of being an accessory after the fact.

The next case, *State v. Chism,* summarizes the distinction between liability as a principal and as an accessory after the fact. The case also asks whether an individual may be held liable for both offenses.

The Statutory Standard

Compare the common law standard with the California Penal Code:

California Penal Code Sections 30–32.

Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Consider the Florida statute and the limitation on the liability of family members:

Florida Statutes Section 777.03(1).

Any person not standing in the relation of husband or wife, parent or grandparent, child or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, who maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that the offender had committed a felony or been accessory thereto before the fact, with intent that the offender avoids or escapes detection, arrest, trial or punishment, is an accessory after the fact.

Model Penal Code

Section 242.3. Hindering Apprehension or Prosecution

A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime, he:

(1) harbors or conceals the other; or

(2) provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or effecting escape; or

(3) conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence; or

(4) warns the others of impending discovery or apprehension. . . .

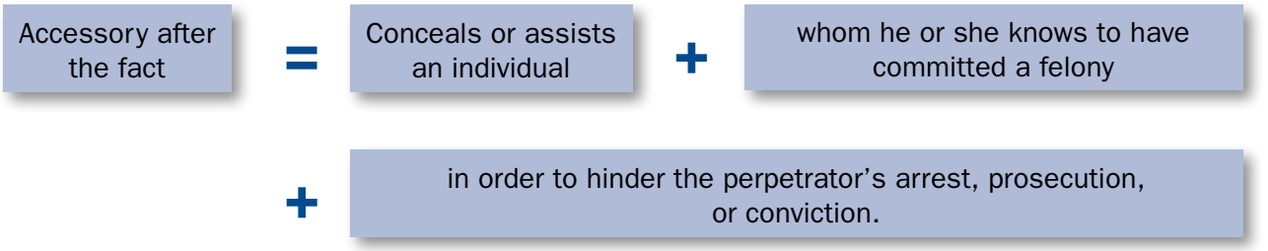
(5) volunteers false information to a law enforcement officer. . . .

Analysis

The Model Penal Code views accessory after the fact as obstruction of justice and does not require that the person providing assistance be aware that the alleged offender actually committed a crime. The essence of the crime is interference with the functioning of the legal process. An individual charged with accessory after the fact is thus not treated as a principal. Liability extends to assisting an individual avoid apprehension for a misdemeanor as well as a felony. The Model Penal Code specifies the type of assistance that is prohibited to prevent courts from too narrowly or too broadly interpreting the behavior that is prohibited.

Accessory after the fact is punished as a felony carrying five years' imprisonment if the person aided is charged or is liable to be charged with a felony of the first or second degree. Assisting a felony of the third degree (one to two years in prison) or a misdemeanor is punished as a misdemeanor. The fact that the person who provides assistance is related to the individual confronting a criminal charge is to be considered as a mitigating factor at sentencing rather than being considered as a complete defense.

The Legal Equation



Was Chism an accessory after the fact?

State v. Chism, *436 So. 2d 464 (La. 1983), Opinion by: Dennis, J.*

Facts

On the evening of August 26, 1981, in Shreveport, Tony Duke gave the defendant, Brian Chism, a ride in his automobile. Brian Chism was impersonating a female, and Duke was apparently unaware of Chism's disguise. After a brief visit at a friend's house, the two stopped to pick up some beer at the residence of Chism's grandmother. Chism's one-legged uncle, Ira Lloyd, joined them, and the three continued on their way, drinking as Duke drove the automobile. When Duke expressed a desire to have sexual relations with Chism, Lloyd announced that he wanted to find his ex-wife Gloria for the same purpose. Shortly after midnight, the trio arrived at the St. Vincent Avenue Church of Christ and persuaded Gloria Lloyd to come outside. As Ira Lloyd stood outside the car attempting to persuade Gloria to come with them, Chism and Duke hugged and kissed on the front seat as Duke sat behind the steering wheel.

Gloria and Ira Lloyd got into an argument, and Ira stabbed Gloria with a knife several times in the stomach and once in the neck. Gloria's shouts attracted the attention of two neighbors, who unsuccessfully tried to prevent Lloyd from pushing Gloria into the front seat of the car alongside Chism and Duke. Lloyd climbed into the front seat also, and Duke drove off. One of the bystanders testified that she could not be sure but she thought she saw Chism's foot on the accelerator as the car left.

Lloyd ordered Duke to drive to Willow Point, near Cross Lake. When they arrived, Chism and Duke, under Lloyd's direction, removed Gloria from the vehicle and placed her on some high grass on the side of the roadway, near a wood line. Lloyd was unable to help the two, because his wooden leg had come off. Afterwards, as Lloyd requested, the two drove off, leaving Gloria with him.

There was no evidence that Chism or Duke protested, resisted, or attempted to avoid the actions that Lloyd ordered them to take. Although Lloyd was armed with a knife, there was no evidence that he threatened either of his companions with harm.

Duke proceeded to drop Chism off at a friend's house, where Chism changed to male clothing. He placed his blood-stained women's clothes in a trash bin. Afterward, Chism went with his mother to the police station at 1:15 A.M. He gave the police a complete statement and took the officers to the place where Gloria had been left with Ira Lloyd. The police found Gloria's body in some tall grass several feet from that spot. An autopsy indicated that stab wounds had caused her death. Chism's discarded clothing disappeared before the police arrived at the trash bin.

Chism was convicted of being an accessory after the fact and appealed to the Louisiana Supreme Court. Louisiana statute 14.25 provides that an accessory after the fact is an individual who, "after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction or punishment." An individual who is convicted under this statute is subject to a fine and imprisonment of up to five years in prison, provided that "in no case shall his punishment be greater than one-half of the maximum provided by law for a principal offender."

Issue

Defendant appealed his conviction and sentence and argued that the evidence was not sufficient to support the judgment. Consequently, we must determine whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that (a) a completed felony had been committed by Ira Lloyd before Brian Chism rendered him the assistance described below, (b) Chism knew or had reasonable grounds to know of the commission of the felony by Lloyd, and (c) Chism gave aid to Lloyd personally under circumstances that indicate either that he actively desired that the felon avoid or escape arrest, trial, conviction, or punishment or that he believed that one of these consequences was substantially certain to result from his assistance.

Reasoning

An accessory after the fact is any person, who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that the offender has committed the felony and with the intent that the offender may avoid or escape from arrest, trial, conviction, or punishment. . . . We conclude that a person may be punished as an accessory after the fact if he aids an offender personally, knowing or having reasonable ground to believe that the offender has committed the felony, and having a specific or general intent that the offender will avoid or escape from arrest, trial, conviction, or punishment. An accessory after the fact may be tried and convicted notwithstanding the fact that the principal felon may not have been arrested, tried, convicted, or amenable to justice. However, it is still necessary to prove the guilt of the principal beyond a reasonable doubt, and an accessory after the fact cannot be convicted or punished where the principal felon has been acquitted. Furthermore, it is essential to prove that a felony was committed and completed prior to the time the assistance was rendered the felon, although it is not also necessary that the felon have been already charged with the crime. . . .

There was clearly enough evidence to justify the finding that a felony had been completed before any assistance was rendered to Lloyd by the defendant. The record vividly demonstrates that Lloyd fatally stabbed his ex-wife before she was transported to Willow Point and left in the high grass near a wood line. Thus, Lloyd committed the felonies of attempted murder, aggravated battery, and simple kidnapping before Chism aided him in any way. A person cannot be convicted as an accessory after the fact to a murder because of aid given after the murderer's acts but before the victim's death, but under these circumstances the aider may be found to be an accessory after the fact to the felonious assault. In this particular case, it is of no consequence that the defendant was formally charged with accessory after the fact to second degree murder, instead of accessory after the fact to attempted murder, aggravated battery, or simple kidnapping. The defendant was fairly put on notice of the actual acts underlying the offense with which he was charged, and he does not claim or demonstrate in this appeal that he has been prejudiced by the form of the indictment.

The evidence overwhelmingly indicates that Chism had reasonable grounds to believe that Lloyd had committed a felony before any assistance was rendered. In his confessions and his testimony, Chism indicates that the victim was bleeding profusely when Lloyd pushed her into the vehicle, that she was limp and moaned as they drove to Willow Point, and that he knew Lloyd had inflicted her wounds with a knife. The Louisiana offense of accessory after the fact deviates somewhat from the original common law offense in that it does not require that the defendant actually know that a completed felony has occurred. Rather, it incorporates an objective standard by requiring only that the defendant render aid "knowing or having reasonable grounds to believe" that a felony has been committed.

The closest question presented is whether any reasonable trier of fact could have found beyond a reasonable doubt that Chism assisted Lloyd under circumstances that indicate that either Chism actively desired that Lloyd would avoid or escape arrest, trial, conviction, or punishment, or that Chism believed that one of these consequences was substantially certain to result from his assistance. After carefully reviewing the record, we conclude that the prosecution satisfied its burden of producing the required quantity of evidence.

Holding

In this case we conclude that the evidence is sufficient to support an ultimate finding that the reasonable findings and inferences permitted by the evidence exclude every reasonable hypothesis of innocence. Despite evidence supporting some contrary inferences, a trier of fact reasonably could have found that Chism acted with at least a general intent to help Lloyd avoid arrest, because (1) Chism did not protest or attempt to leave the car when his uncle, Lloyd, shoved the mortally wounded victim inside; (2) he did not attempt to persuade Duke, his would-be lover, to exit out the driver's side of the car and flee from his uncle, whom he knew to be one-legged and armed only with a knife; (3) he did not take any of these actions at any point during the considerable ride to Willow Point; (4) at their destination, he docilely complied with Lloyd's directions to remove the victim from the car and leave Lloyd with her, despite the fact that Lloyd made no threats and that his wooden leg had become detached; (5) after leaving Lloyd with the dying victim, he made no immediate effort to report the victim's whereabouts or to obtain emergency medical treatment for her; (6) before going home or reporting the victim's dire condition, he went to a friend's house, changed clothing, and discarded his own in a trash bin from which the police were unable to recover them as evidence; (7) he went home without reporting the victim's condition or location; (8) and he went to the police station to report the crime only after arriving home and discussing the matter with his mother.

The defendant asserted in his statement given to the police and during trial that he helped to remove the victim from the car and to carry her to the edge of the bushes, because he feared that his uncle would use the knife on him. The defense of justification can be claimed in any crime, except murder, when it is committed through the compulsion of threats by another of death or great bodily harm and the offender reasonably believes the person making the threats is present and would immediately carry out the threats if the crime were not committed. However, Chism did not testify that Lloyd threatened him with death, bodily harm, or anything. Moreover, fear as a motivation to help his uncle is inconsistent with some of Chism's actions after he left his uncle. Consequently, we conclude that despite Chism's testimony, the trier of fact could have reasonably found that he acted voluntarily and not out of fear when he aided Lloyd and that he did so under circumstances indicating that he believed that it was substantially certain to follow from his assistance that Lloyd would avoid arrest, trial, conviction, or punishment.

For the foregoing reasons, it is also clear that… there is evidence in this record from which a reasonable trier of fact could find a defendant guilty beyond a reasonable doubt. . . . Therefore, we affirm the defendant's conviction.

Dissenting, *Dixon, C.J.*

I respectfully dissent from what appears to be a finding of guilt by association. The majority lists five instances of inaction, or failure to act, by defendant: He (1) did not protest or leave the car, (2) did not attempt to persuade Duke to leave the car, (3) did neither (1) nor (2) on the ride to Willow Point, (5) made no immediate effort to report the crime or get aid for the victim, and (7) failed to report the victim's condition or location after changing clothes. The three instances of defendant's action relied on by the majority for conviction were stated to be (4) complying with Lloyd's direction to remove the victim from the car and leave the victim and Lloyd at Willow Point, (6) changing clothes and discarding bloody garments, and (8) discussing the matter with defendant's mother before going to the police station to report the crime. None of these actions or failures to act tended to prove defendant's intent, specifically or generally, to aid Lloyd to avoid arrest, trial, conviction, or punishment.

Questions for Discussion

1. What are the act and intent requirements for accessory after the fact?
2. Why did the appellate court conclude that Chism was an accessory after the fact?
3. Can you explain the reason that Chief Judge Dixon dissented from the majority opinion?
4. As a judge, which fact or facts would you find most important in reaching a decision whether to convict Chism of accessoryship after the fact?
5. Is it legally significant that Lloyd is Chism's uncle?

You Decide

6.5 In a Mississippi case, Xavier Sherron began having intercourse with his thirteen-year-old stepdaughter Jane in December 2001 or January 2002. Charlotte Sherron, Xavier's wife and Jane's mother, learned that Xavier had been having intercourse with Jane on a regular basis, and Xavier assured her that he would not continue to molest Jane. Charlotte directed Jane to lock her door. Charlotte needed Xavier's monthly disability checks to make ends meet and did not ask him to leave her house. Charlotte also was fearful that in the event the rape was revealed, her three children would be taken from her by state authorities.

In February 2002, Jane told Charlotte that she was pregnant and stated that an abortion was preferable to bearing Xavier's child. Charlotte agreed with other family members that she would not contact the police, and Charlotte arranged for an abortion for Jane in Tuscaloosa, Alabama. Both Charlotte and Xavier drove Jane to Tuscaloosa. In May 2002, Jane's uncle approached the police, and Xavier subsequently was arrested and convicted of statutory rape. Charlotte was arrested as an accessory after the fact to the statutory rape based on her assisting Jane in obtaining an abortion. There was no charge brought against Charlotte for failing to fulfill her obligation as a Mississippi school employee to inform the police of Jane's abuse.

The court analyzed Jane's abortion under the requirements of Mississippi law and noted that Alabama law presumably contained the same provisions. A child who desires to obtain an abortion in Mississippi either must get parental consent or must petition the court for permission to obtain an abortion. The appellate court stated that the question is whether Charlotte's consent to Jane's abortion was based on a desire to support her daughter or based on an intent to conceal her husband's crimes. There was testimony at trial that Charlotte was afraid of Xavier, who in the past had choked Charlotte and had thrown objects at her.

Would you convict Charlotte of being an accessory after the fact to Xavier's statutory rape? See *Sherron v. State,* 959 So. 2d 30 (Miss. App. 2006).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

On August 14, 1999, Kenneth Foster, along with Murceo Brown, Dewayne Dillard, and Julius Steen, spent the evening smoking marijuana, drinking, and carrying out two armed robberies in San Antonio, Texas. While driving home, the four men decided to follow the car of Michael LaHood, Jr., a twenty-five-year-old law student, and Mary Patrick. Their alleged purpose was to get Mary's phone number. Five miles later, LaHood pulled up in front of his apartment. Brown exited the car, and both Steen and Foster later testified that they did not realize that Brown had taken Dillard's gun from the car. Brown and LaHood entered into an exchange, and Brown shot and killed LaHood. The three individuals in the car were eighty-five feet from the killing, and Foster and Steen testified that they did not anticipate that the evening would end in a killing. Foster wanted to flee, but Dillard and Steen persuaded him to wait for Brown.

Dillard was tried for an unrelated murder and sentenced to life in prison. Steen was given immunity in exchange for his testimony and was sentenced to life imprisonment for aggravated robbery. Brown and Foster were prosecuted in a joint trial. Brown was convicted of murder and subsequently executed. Foster was charged under the controversial Texas "Law of Parties," which was adopted in 1974. This statute authorizes prosecutors to charge defendants like Foster with capital murder where a murder is committed during the course of a felony in which the defendant was involved as a conspirator to a murder. The prosecution is not required to establish that the defendant possessed an intent to kill or to demonstrate a reckless disregard of human life; it is sufficient that the murder "should have been anticipated" (Tex. Penal Code, § 7.02.3(b)). Foster was convicted, the jury found no mitigating circumstances sufficient to outweigh his guilt, and Foster was sentenced to death.

Foster's death sentence led to a chorus of criticism of Texas prosecutors' use of the Law of Parties to obtain a death sentence against a defendant who was not present during a killing, had not been a major participant in the felony, and who demonstrated neither a specific intent to kill nor a reckless disregard for human life. Critics alleged that prosecutors regularly employed the statute to obtain death sentences against accomplices in those instances in which they were unable to establish the defendant's specific intent to promote a killing. Robert Owen, director of the Capital Punishment Clinic at the University of Texas Law School, noted that Foster was being held liable for a failure to be a psychic: "It's terribly risky to allow the death penalty to be imposed where the jury has to draw inferences about what was in the defendant's mind." Foster's attorney contended that his client was being held liable for capital murder based on a failure to exercise reasonable care, or what is termed negligence. This is far removed from the type of purposeful or reckless intent that typically is required to sentence an individual to death, a penalty that the Supreme Court had reserved for the "worst of the worst."

Critics also objected to the arbitrary nature of the prosecutor's decision to seek capital punishment against Foster while striking a plea bargain with Dillard. Defenders of Foster's sentence pointed out that Foster should have been aware that Brown posed a threat given the earlier events in the evening of August fourteenth. The imposition of the death penalty in these circumstances served as a deterrent to individuals contemplating involvement in a burglary, robbery, or rape.

Texas is unique in its willingness to execute accomplices. There reportedly are between eighty and one hundred individuals awaiting execution in Texas who have been convicted as accomplices to murder. The nonprofit Death Penalty Information Center, which is opposed to capital punishment, found that in the United States, only eight individuals have been executed in the past thirty years who were accomplices who did not actually commit or order a murder. (They do not count murder for hire.) Between 1985 and 1993, Texas executed three individuals as accomplices to murder.

The prevailing law on the constitutionality under the Eighth Amendment of executing individuals who do not actually kill is not crystal clear. In *Enmund v. Florida,* the Court held that it was unconstitutional to execute the driver of a getaway car who lacked a criminal intent and who did not participate in a robbery and murder (458 U.S. 782 (1987)). On the other hand, in *Tison v. Arizona,* the Court noted that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent life may justify the death penalty even absent an intent to kill" *(Tison v. Arizona,* 481 U.S. 137 (1987)). Which precedent is applicable to Foster is open to debate.

Former U.S. President Jimmy Carter and South African Archbishop Desmond Tutu urged Texas not to execute Foster. The Texas Board of Pardons and Paroles seemed to take notice of the political rallies and newspaper editorials opposing Foster's execution and voted six to one to recommend that the governor of Texas grant Foster a reprieve. On August 30, 2008, three hours before Foster's scheduled execution, Governor Perry commuted Foster's sentence to life imprisonment. The governor explained that he was troubled by the fact that Foster had been prosecuted at the same trial as Brown. Foster, aged thirty, will be eligible for parole after thirty years in prison.

The controversy over the Law of Parties promises to continue. In August 2008, federal court judge Orlando Garcia granted a stay of execution to Jeff Wood based on Wood's mental incompetence. Wood had been sentenced to death for driving the getaway car in a 1996 murder. Danny Renau had killed gas station attendant Kris Keernan after Keernan had refused to cooperate in staging a robbery. Wood, on hearing the shot, joined Renau in the service station and assisted in the robbery. Renau was executed in 2002.

Does Kenneth Foster deserve to be executed?

Vicarious Liability

We have seen that **strict liability** results in holding a defendant criminally responsible for the commission of a criminal act without a requirement of a criminal intent. An act, in other words, is all that is required. Vicarious liability imposes liability on an individual for a criminal act committed by another. They act and you are responsible. *Accomplice liability,* in contrast, holds individuals responsible who affirmatively aid and abet a criminal act with a purposeful intent.

Vicarious liability is employed to hold employers and business executives and corporations (which are considered "legal persons") liable for the criminal acts of employees. Vicarious liability has also been used to hold the owner of an automobile liable for parking violations committed by an individual driving the owner's car. Another example of vicarious liability is imposing liability on parents for crimes committed by their children.

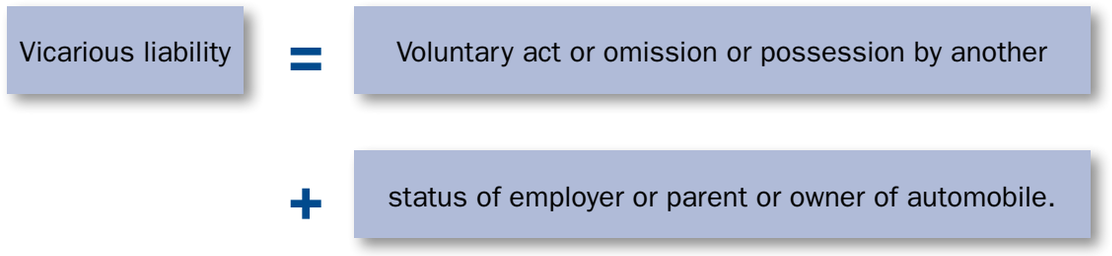
Vicarious liability is contrary to the core principle that individuals should be held responsible and liable for their own conduct. The primary reason for this departure from individual responsibility in the case of corporations is to encourage employers to control and to monitor employees so as to insure that the public is protected from potential dangers, such as poisoned food.[23]

We have distinguished strict and vicarious liability. Keep in mind that statutes that are intended to protect the public health, safety, and welfare typically combine both doctrines. In the California case of *People v. Travers,* Mitchell, a service station employee, misrepresented the quality of motor oil he sold to the public. The defendant Charles Travers was the owner of the station and was prosecuted along with Mitchell under a statute that punished the sale of a misbranded product. Travers objected that he was completely unaware of Mitchell's actions. The court reasoned that the importance of smoothly running motor vehicles and the right of the public to receive what they paid for justified the imposition of vicarious liability on Travers without the necessity of demonstrating that he possessed a criminal intent. The court explained that it was reasonable to expect a service station owner to supervise the sale of motor oil, and requiring the prosecution to establish criminal intent would permit owners to escape punishment by pleading that they were unaware of the quality or contents of the motor oil sold in their service stations.[24]

Is it fair to impose strict liability on Travers for the acts of Mitchell? Would a significant number of guilty people be acquitted in the event that the court required the prosecution to establish a criminal intent? Professor LaFave poses a choice between punishing one hundred people for selling tainted food under a strict liability statute or using an intent standard that would result in the conviction of five of the one hundred. The first alternative would result in some innocent people being convicted; the second alternative would result in some guilty people avoiding a criminal conviction. What is the better approach?[25]

In the next section we will consider the use of vicarious liability to hold corporations criminally liable.

The Legal Equation



Corporate Liability

The early common law adopted the logical position that corporations are not living and breathing human beings and therefore could not be held criminally liable. There was no doctrine of **corporate liability**, prosecution, and punishment. Prosecution and punishment were limited to corporate officers and employees. Over time, corporations were subject to fines for failing to

maintain the repair of public works such as roads and bridges.[26] The increasing power and prominence of large-scale business enterprises resulted in the gradual growth of the idea of corporate criminal liability and the punishment of corporations through the imposition of financial penalties. The U.S. Supreme Court noted in 1909 that acts of an employee "may be controlled in the interests of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting."[27]

The U.S. Supreme Court, in *United States v. Dotterweich,* affirmed in 1943 that corporations, along with corporate executives and employees, could be held criminally liable under the Food and Drug Act. The Court stressed that holding the president of the corporation and the corporation vicariously liable for the strict liability crimes of employees was intended to ensure that company executives and managers closely monitor the distribution of potentially dangerous drugs to the public.[28] In *United States v. Park,* the Supreme Court upheld the conviction of a large national food store chain, along with the president of the company, for shipping adulterated food in interstate commerce.[29]

Keep in mind that a corporate crime may result in the criminal conviction of the employee committing the offense as well as the extension of vicarious liability to the owner and the corporation. There is nothing mysterious about a corporation. It is a method of organizing a business that provides certain financial benefits in return for complying with various state regulations. Note that most small corporations typically are run by an owner or by several partners, although moderately sized and larger corporations may be organized with boards of directors and outside investors or shareholders. The corporation possesses a life of its own separate and apart from all the executives, managers, and employees and is considered a "person" under the law.

The first step in determining whether a corporation may be criminally liable is to examine whether the legislature intends the criminal statute to apply to corporations. In *United States v. Dotterweich,* the U.S. Supreme Court affirmed the conviction of the defendant and corporation under the Federal Food, Drug, and Cosmetic Act for introducing an "adulterated or misbranded" drug into interstate commerce. The Court stressed that "a person" under the act was defined to include corporations. Courts have ruled in other instances that the term *person* was limited to "natural persons" and did not include "corporate persons."[30]

Once it is determined that a statute encompasses corporations, there are two primary tests for determining whether a corporation should be criminally liable under the statute.

- *Respondeat Superior or the Responsibility of a Superior.* A corporation may be held liable for the conduct of an employee who commits a crime within the scope of his or her employment who possesses the intent to benefit the corporation.
- *Model Penal Code Section 2.07*. Criminal liability is imposed in those instances that the criminal conduct is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial official acting on behalf of the corporation within the scope of his or her office or employment.

Respondeat superior extends vicarious criminal liability to a corporation for the acts of employees, even when such acts are contrary to corporate policy. It may seem unfair to impose liability on a corporation for the independent criminal acts of an employee, such as Mitchell's selling of motor oil in the *Travers* case. On the other hand, Mitchell's sale of misbranded motor oil increased the company's profits. The Model Penal Code test limits vicarious liability to acts approved or tolerated by high-level corporate officials. Managers, corporate boards, and corporate entities under this approach are liable only for acts that they direct or tolerate. Under this test, decision makers may not possess an incentive to closely monitor employees to ensure that they are not engaging in acts that have not been approved by management. A corporation, for instance, would not be convicted for Mitchell's independent decision to misrepresent the quality of motor oil sold to consumers. Which test do you favor?

Public Policy

There is an increasing trend toward holding corporations criminally liable. The aim is to encourage corporate executives to vigorously prevent and punish illegal activity. Executives know that a criminal conviction may lead to a decline in consumer sales and investment in the firm as well as to criminal fines, and they have a powerful incentive to ensure that the corporation acts in a legal fashion. The prevention of corporate misconduct is important, because we depend on large firms to provide safe and secure health care, transportation, food, and safe products in the home.

Holding a corporation strictly and vicariously liable also makes good sense because business decisions often involve a large number of individuals, and it often is difficult to single out a specific individual or individuals as responsible for designing, manufacturing, marketing, and delivering a defective drug or automobile.[31]

On the other hand, it seems unfair to hold a corporation strictly and vicariously liable and to impose a heavy fine for crimes that may have been committed by low-level employees or managers or secretly approved by a high-level corporate executive. A criminal fine against a corporation is merely paid out of the corporate treasury, and the threat of a financial penalty may not encourage corporate officials to monitor the activities of employees. A fine may also be passed on to consumers, who will be charged a higher price. In the final analysis, the profits to be gained from misrepresenting the effectiveness of a drug may far outweigh any fine that may be imposed. Critics of corporate liability argue that it makes more sense to limit criminal liability to the individuals who committed the offense.[32]

Are there penalties other than fines that might be used against corporations? One federal district court imposed a three-year prison sentence on a corporation that was later suspended. The court observed that this could be carried out by ordering the U.S. marshal to seize corporate assets such as computers, machinery, and trucks. This type of punishment has the advantage of completely shutting down a business. On the other hand, it would likely result in innocent individuals losing their jobs.[33]

Should vicarious liability be extended to corporations for crimes requiring a criminal intent or recklessness? Why should a corporation be immune from a conviction for serious crimes that may result in injury or death? But how can a corporation possess a criminal intent?

In *Commonwealth v. Penn Valley Resorts, Inc.,* the resort and owner were convicted of involuntary manslaughter. The resort was fined $10,000. A Pennsylvania statute, section 307(a)(2), provides that a corporation may be convicted of an offense "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of employment." The court held that the resort owner qualified as a "high managerial agent" under the statute and that the law did not limit the vicarious responsibility of corporations to strict liability health, safety, and welfare offenses.

In *Penn Valley,* Edwin Clancy, the president of the resort, permitted a group of underage students to engage in a drinking binge at the resort. William Frazier, a twenty-year-old, drank excessively for five or six hours. Clancy personally served alcohol to Frazier and seized and later handed Frazier back the keys to Frazier's automobile and encouraged the drunk and hostile student to leave the resort. Frazier was subsequently killed when his car drove off the road and hit a bridge. He was found to possess a blood alcohol content of .23. The Pennsylvania Supreme Court concluded that the resort, "through its managerial agent, committed involuntary manslaughter and reckless endangerment." How can a corporation act with gross disregard for the safety of customers? On the other hand, Clancy was president, and his acts legally obligated and financially benefited the corporation.[34]

In the next case in the chapter, *Commonwealth v. Koczwara,* the Supreme Court of Pennsylvania examines whether the legislature intended to impose vicarious liability on the owner of a bar for the sale of liquor by his employees. Pay particular attention to the supreme court's reasoning in reviewing the constitutionality of the owner's criminal conviction. Give careful consideration to the views of the dissenting judge.

The Statutory Standard

Consider these selected portions of the Texas statute on corporate liability.

Texas Code Annotated Section 7.22.

(1) If conduct constituting an offense is performed by an agent acting in behalf of a corporation . . . and within the scope of his office or employment, the corporation . . . is criminally responsible for the offense defined. . . .
   (a) in this code where corporations and associations are made subject thereto;
   (b) by law . . . in which a legislative purpose to impose criminal responsibility on corporations . . . plainly appears . . .

(c) by law . . . for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations plainly appears.

(2) A corporation or association is criminally responsible for a felony offense only if its commission was authorized, requested, commanded, performed or recklessly tolerated by . . . a majority of the governing board . . . a high managerial agent acting in behalf of the corporation . . . and within the scope of his office or employment. . . .

Texas Code Annotated Section 7.24.

It is an affirmative defense to prosecution of a corporation or association . . . that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

Can a bar owner be held vicariously liable and sentenced to jail for the sale of liquor to a minor?

Commonwealth v. Koczwara, *155 A.2D 825 (PA. 1959), Opinion by: Cohen, J.*

This is an appeal from the judgment of the Court of Quarter Sessions of Lackawanna County sentencing the defendant to three months in the Lackawanna County Jail and a fine of $5,000 and the costs of prosecution in a case involving violations of the Pennsylvania Liquor Code.

Facts

John Koczwara, the defendant, is the licensee and operator of an establishment on Jackson Street in the City of Scranton known as J.K.'s Tavern. At that place he had a restaurant liquor license issued by the Pennsylvania Liquor Control Board. . . .

At the conclusion of the Commonwealth's evidence, count three of the indictment, charging the sale by the defendant personally to the minors, was removed from the jury's consideration by the trial judge on the ground that there was no evidence that the defendant had personally participated in the sale or was present in the tavern when sales to the minors took place. . . . The case went to the jury, and the jury returned a verdict of guilty as to each of the remaining three counts: two counts of permitting minors to frequent the licensed premises without parental or other supervision and the count of permitting sales to minors. . . . Judge Hoban . . . sentenced the defendant to pay the costs of prosecution, a fine of $500, and to undergo imprisonment in the Lackawanna County Jail for three months. The defendant took an appeal to the Superior Court, which . . . affirmed the judgment and sentence of the lower court.

Judge Hoban found as fact that

> in every instance the purchase [by minors] was made from a bartender, not identified by name, and service to the boys was made by the bartender. There was no evidence that the defendant was present on any one of the occasions testified to by these witnesses, nor that he had any personal knowledge of the sales to them or to other persons on the premises.

Issue

We, therefore, must determine the criminal responsibility of a licensee of the Liquor Control Board for acts committed by his employees upon his premises; without his personal knowledge, participation, or presence; which acts violate a valid regulatory statute passed under the commonwealth's police power.

Reasoning

While an employer in almost all cases is not criminally responsible for the unlawful acts of his employees unless he consents to, approves, or participates in such acts, courts all over the nation have struggled for years in applying this rule within the framework of "controlling the sale of intoxicating liquor." . . . At common law, any attempt to invoke the doctrine of respondeat superior in a criminal case would have run afoul of our deeply ingrained notions of criminal jurisprudence that guilt must be personal and individual.

In recent decades, however, many states have enacted detailed regulatory provisions in fields that are essentially noncriminal, e.g., pure food and drug acts; speeding ordinances; building regulations; and child labor, minimum wage, and maximum hour legislation. Such statutes are generally enforceable by light penalties, and although violations are labeled crimes, the considerations applicable to them are totally different from those applicable to true crimes, which involve moral delinquency and which are punishable by imprisonment or another

serious penalty. Such so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt. It is here that the social interest in the general well-being and security of the populace has been held to outweigh the individual interest of the particular defendant. The penalty is imposed despite the defendant's lack of a criminal intent or *mens rea*.

Not the least of the legitimate police power areas of the legislature is the control of intoxicating liquor. . . . It is abundantly clear that the conduct of the liquor business is lawful only to the extent and manner permitted by statute. Individuals who embark on such an enterprise do so with knowledge of considerable peril, since their actions are rigidly circumscribed by the Liquor Code.

Because of the peculiar nature of this business, one who applies for and receives permission from the commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizens. As the licensee of the board, he is under a duty not only to regulate his own personal conduct in a manner consistent with the permit he has received but also to control the acts and conduct of any employee to whom he entrusts the sale of liquor. Such fealty is the price that the commonwealth demands in return for the privilege of entering the highly restricted and, what is more important, the highly dangerous business of selling intoxicating liquor.

The question here raised is whether the legislature intended to impose vicarious criminal liability on the licensee-principal for acts committed on his premises without his presence, participation, or knowledge.

Reasoning

In the Liquor Code, section 493, the legislature has set forth twenty-five specific acts that are condemned as unlawful, and for which penalties are provided in section 494. Subsections (1) and (14) of section 493 contain the two offenses charged here. In neither of these subsections is there any language that would require the prohibited acts to have been done knowingly, willfully, or intentionally, there being a significant absence of such words as *knowingly, willfully,* and so forth. . . . It indicates a legislative intent to eliminate both knowledge and criminal intent as necessary ingredients of such offenses.

As the defendant has pointed out, there is a distinction between the requirement of a *mens rea* and the imposition of vicarious absolute liability for the acts of another. It may be that the courts below, in relying on prior authority, have failed to make such a distinction. In any case, we fully recognize it. Moreover, we find that the intent of the legislature in enacting this code was not only to eliminate the common law requirement of a *mens rea* but also to place a very high degree of responsibility upon the holder of a liquor license to make certain that neither he nor anyone in his employ commit any of the prohibited acts upon the licensed premises. Such a burden of care is imposed upon the licensee in order to protect the public from the potentially noxious effects of an inherently dangerous business. We, of course, express no opinion as to the wisdom of the legislature's imposing vicarious responsibility under certain sections of the Liquor Code. There may or may not be an economic-sociological justification for such liability on a theory of deterrence. Such determination is for the legislature to make, so long as the constitutional requirements are met. . . .

Holding

Defendant, by accepting a liquor license, must bear this financial risk. Because the defendant had a prior conviction for violations of the code, however, the trial judge felt compelled under the mandatory language of the statute, section 494(a), to impose not only . . . a fine of $500 but also a three month sentence of imprisonment. Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this court consistently with . . . clause of section 9, article I of the constitution of the Commonwealth of Pennsylvania . . . which prohibits an individual from being "deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

. . . We have found no case in any jurisdiction that has permitted a prison term for a vicarious offense. . . . Our own courts have stepped in time and again to protect a defendant from being held criminally responsible for acts about which he had no knowledge and over which he had little control. . . . We would be utterly remiss were we not to so act under these facts. . . . In holding that the punishment of imprisonment deprives the defendant of due process of law under these facts, we are not declaring that Koczwara must be treated as a first offender under the code. He has clearly violated the law for a second time and must be punished accordingly. Therefore, we are only holding that so much of the judgment as calls for imprisonment is invalid, and we are leaving intact the $500 fine imposed by Judge Hoban under the subsequent offense section.

Dissenting, *Musmanno, J.*

The majority of this court is doing something that can find no justification in all the law books that ornament the libraries and enlighten the judges and lawyers in this commonwealth. It sustains the conviction of a person for acts admittedly not committed by him, not performed in his presence, not accomplished at his direction, and not even done within his knowledge. It is stigmatizing him with a conviction for an act that, in point of personal responsibility, is as far removed from him as if it took place across the seas. The majority's decision is so novel, so unique, and so bizarre that one must put on his spectacles, remove them to wipe the lenses, and then put them

on again in order to assure himself that what he reads is a judicial decision proclaimed in Philadelphia, the home of the Liberty Bell, the locale of Independence Hall, and the place where the fathers of our country met to draft the Constitution of the United States, the Magna Carta of the liberties of Americans and the beacon of hope of mankind seeking justice everywhere. The decision handed down in this case throws a shadow over that Constitution, applies an eraser to the Bill of Rights, and muffles the Liberty Bell that many decades ago sang its song of liberation from monarchical domination over man's inalienable right to life, liberty, and the pursuit of happiness. . . .

The majority introduces into its discussion a proposition that is shocking to contemplate. It speaks of "vicarious criminal liability." Such a concept is as alien to American soil . . . [T]here was a time in China when a convicted felon sentenced to death could offer his brother or other close relative in his stead for decapitation. The Chinese law allowed such "vicarious criminal liability." I never thought that Pennsylvania would look with favor on anything approaching so revolting a barbarity.

The majority says that it cannot permit the sentencing of a man to jail "for acts about which he had no knowledge and over which he had little control." It says, "Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this court consistently with the law of the land" . . . but if the Majority cannot sanction the incarceration of a person for acts of which he had no knowledge, how can it sanction the imposition of a fine? How can it sanction a conviction at all? . . .

Questions for Discussion

1. What is the justification for the vicarious liability of John Koczwara? Is there any evidence that Koczwara was aware of the sale of liquor to juveniles? Could he have prevented his employees from selling the liquor? Why does the Pennsylvania Supreme Court not affirm Koczwara's prison sentence?
2. What are the reasons that Judge Musmanno dissents from Koczwara's conviction? Would following Judge Musmanno's view weaken the law against serving alcohol to minors?
3. This was Koczwara's second offense. Will fining Koczwara encourage him to prevent the sale of alcohol to minors in the future? Under what factual conditions do you believe that the Pennsylvania Supreme Court would have affirmed Koczwara's prison sentence?

You Decide

6.6 A seventeen-year-old rented sexually oriented videotapes on two occasions from VIP Video in Millville, Ohio. The first time, the seventeen-year-old used his father's driver's license for identification, and the second time he paid in cash and the clerk did not ask him for an identification or proof of age. The owner of the store, Peter Tomaino, did not post a sign in the store indicating that sexually oriented rentals would not be made to juveniles. Tomaino was absent from the store at the time of the rentals. He was convicted under a statute that provides that "no person, with knowledge of its character or content, shall recklessly . . . sell . . . material . . . that is obscene or harmful to juveniles."

Should Tomaino's conviction be overturned? Could he constitutionally be sentenced to prison? Consider whether this statute differs from the legislative enactment in Koczwara. See *State v. Tomaino,* 733 N.E.2d 1191 (Ohio App. 1999).

You can find the answer at www.sagepub.com/lippmanccl2e

Automobiles, Parents, and Vicarious Liability

Vicarious liability, as we have seen, is typically applied to extend criminal liability to corporate executives or businesses. Vicarious liability is also used to hold the owners of automobiles liable for traffic tickets issued to their automobiles. In addition, there is a recent trend toward holding parents vicariously liable for the crimes of their children. Ask yourself the reason for applying vicarious liability in these two instances.

Traffic Tickets

You lend your automobile to a friend, who later informs you that she was ticketed for illegal parking. She forgets to pay the ticket as promised, and later you receive a letter reminding you that you owe money to the county. You protest and are told that as the owner of the

automobile, you are vicariously liable for tickets issued to the car. Will you be successful in fighting this ticket in court?

Most parking statutes consider the owner of the vehicle *prima facie* responsible for paying the ticket. This means that unless you present evidence that you were not responsible, you are presumed liable for the ticket. In other words, the prosecutor is not required to present any evidence to establish your responsibility; you are presumed responsible unless you appear in court and establish that someone else was driving your car.

In *Commonwealth v. Rudinski,* we will consider the constitutionality of a Pennsylvania statute that imposes *prima facie* vicarious liability for traffic tickets on the owner of a car. This approach seems to be based on the desirability of a smooth and efficient method of collecting money that avoids court hearings on the identity of drivers. Why is this unfair? After all, you always can be reimbursed by your friend.

Is the defendant vicariously liable for the parking tickets?

Commonwealth v. Rudinski, *555 A.2D 931 (PA. SUPER. 1989), Opinion by: Olszewski, J.*

Appellant, Michael J. Rudinski, appeals from a judgment of sentence imposing a fine of $15 for violation of a Williamsport city ordinance governing overtime parking and a $15 fine for parking in restricted areas. . . . We affirm the determination of the trial court.

Pennsylvania rule of criminal procedure 95(a) creates an inference that the owner of a vehicle was operating the vehicle for purposes of imposing a civil penalty for infractions of laws or local ordinances relating to the operation of a vehicle. Political subdivisions may use parking tickets to inform defendants of parking violations and to offer defendants an opportunity to avoid criminal proceedings by paying an amount specified on the ticket. When a political subdivision does use parking tickets and a ticket has been handed to a defendant or placed on a vehicle windshield, a criminal proceeding shall be instituted only if the defendant fails to respond as requested on the ticket. In that event, the criminal proceeding shall be instituted by a law enforcement officer filing a citation with the proper issuing authority.

Facts

On June 1, 1987, in the City of Williamsport, a parking ticket for parking in a restricted zone was issued to appellant's car. Subsequently, law enforcement authorities issued a second parking ticket to appellant's vehicle for overtime parking. When the tickets were not paid, appellant received citations pursuant to Pennsylvania Rules of Criminal Procedure 95, which permits law enforcement officials to institute criminal proceedings by issuing a citation following nonpayment of a parking ticket. A district justice found appellant guilty of overtime parking . . . and parking in restricted areas. . . .

Issue

Appellant claims that the trial court erred . . . and denied his right to due process when the Commonwealth did not prove beyond a reasonable doubt the identity of the perpetrator. Appellant contends that because the trial court permitted the Commonwealth to rely upon the presumption that an owner of an automobile parked it, the burden of proof has been unconstitutionally shifted to appellant to establish that he did not park the car. Appellant asserts that the Commonwealth was required to establish beyond a reasonable doubt (1) the illegal parking of an automobile and (2) the identity of the person parking the car. . . .

Reasoning

Preliminarily, we acknowledge that in criminal matters, the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." . . . In a series of U.S. Supreme Court cases, however, the high Court carved out an exception to the general criminal due process considerations in the area of public welfare offenses. . . . Violations of traffic regulations fall squarely within a proper classification of public welfare offenses.

We find other jurisdictions that have upheld the constitutionality of similar ordinances to be instructive in our disposition of this case. As was pointed out in a Massachusetts case, "The inconvenience of keeping watch over parked vehicles to ascertain who in fact operates them would be impracticable, if not impossible, at a time when many vehicles are parked. . . . The rules and regulations of the Boston Traffic Commission . . . were framed and intended to cover and make punishable any violation . . . by the owner of any vehicle registered in his name. . . ."

Particularly helpful is the following excerpt from an opinion of the Supreme Court of Missouri that notes that "the movement of automobile traffic is a major problem in the cities of this state. Cars illegally parked contribute

substantially to that problem and the enforcement of parking regulations is difficult and expensive. Most cars are driven by the owner or . . . with the owner's consent. An ordinance imposing liability for the parking violation fine on the owner . . . may very well result in fewer violations and thereby assist in the reduction of traffic problems."

The parking prohibitions in the instant case are clearly within a permissible regulation in the interest of permitting the public to use public streets to their best advantage. Moreover, the penalty involved is minor, and there is no public stigma attached to receiving a parking ticket. We find that under the public welfare doctrine, it is clear that *prima facie* strict criminal responsibility may be imposed upon the registered owner of an illegally parked vehicle. Therefore, by proving (1) the existence of an illegally parked vehicle (2) registered in the name of the defendant, the Commonwealth can make out a *prima facie* case for imposing responsibility for the violation upon the vehicle's owner. This standard, nonetheless, permits an owner to come forward with evidence that someone else was operating his vehicle in order to rebut the inference that the registered owner is responsible for a vehicle's operation. "In the area of public welfare offenses, such burden shifting is not constitutionally infirm." We emphasize that the result that appellant advocates would create utter chaos for our municipalities and law enforcement officials and in our court system, and therefore, as a practical matter, we refuse to impose a requirement of identifying the driver in parking violation cases.

Holding

The record in the present case indicates that the Commonwealth established that a vehicle registered to appellant was illegally parked on two occasions. Accordingly, based upon the foregoing, we affirm the judgment of sentence.

Questions for Discussion

1. Describe the facts that led to criminal charges being brought against Rudinski.
2. What evidence was the prosecutor required to present at trial to convict Rudinski of parking violations? Explain why this is vicarious liability.
3. Why does Rudinski argue that the Pennsylvania procedure is unconstitutional? What are the reasons offered by the Pennsylvania Supreme Court in rejecting Rudinski's claim?

See more cases on the study site: Seattle v. Stone, Idris v. Chicago, *www.sagepub.com/lippmanccl2e*

Parents

Susan and Anthony Provenzino of St. Clair Shores, Michigan, were aware that their son Alex was experiencing difficulties. He was arrested in May 1995, and the Provenzinos obtained Alex's release from juvenile custody in the fall of 1995, fearing that he would be mistreated by violent juveniles housed in the facility. Over the course of the next year, Alex was involved in a burglary, excessive drinking, and using and selling marijuana. Alex verbally abused his parents at home and on one occasion attacked his father with a golf club. In May 1996, the Provenzinos were convicted of violating a two-year-old local ordinance that placed an affirmative responsibility on parents to "exercise reasonable control over their children." The jury required only fifteen minutes to find them guilty; each was fined $100 and ordered to pay $1,000 in court fees.[35]

Roughly seventeen states and cities today have similar **parental responsibility laws**. States have a long history of passing laws against parents who abuse, neglect, or abandon their children or fail to ensure that their children attend school. In 1903, Colorado was the first state to punish "contributing to the delinquency of a minor." Similar provisions were subsequently adopted by roughly forty-two states and the District of Columbia. These statutes are not limited to parents and require some affirmative act on the part of an adult that aids, encourages, or causes the child's delinquent behavior.[36]

The first wave of parental responsibility statutes were passed in the late 1980s and early 1990s, when various states and municipalities adopted laws holding parents strictly and vicariously liable for the criminal conduct of their children. It was presumed that parents possess a duty to supervise their offspring and that this type of statute would encourage parents to monitor and to control their kids. These strict and vicarious liability statutes were ruled unconstitutional in Connecticut, Louisiana, Oregon, and Wyoming.

Parental responsibility statutes generally hold parents responsible for the failure to take reasonable steps to prevent their children from engaging in serious or persistent criminal behavior. A New York law, for instance, punishes a parent who "fails or refuses to exercise reasonable diligence in the control of . . . a child to prevent him from becoming . . . a 'juvenile delinquent' or a 'person

in need of supervision.' . . ." These statutes, as illustrated by the New York law, generally lack clear and definite standards.[37]

There are a variety of laws that hold adults liable for teenage drinking. **Social host liability laws** hold adults liable for providing liquor in their home to minors in the event that an accident or injury occurs. Variants are so-called **teen party ordinances**, which declare that it is criminal for an adult to host a party for minors at which alcohol is served.

The next case, *Williams v. Garcetti,* considers the constitutionality of a California parental responsibility statute. On the one hand, it seems unfair to hold parents vicariously liable for the criminal acts of their children. On the other hand, parents would certainly seem to have certain obligations and responsibilities to society based on their decision to have children. Holding parents liable may lead them to closely supervise their children and may serve to protect society. What is your view?

Should parents be held liable for a failure to exercise reasonable care to prevent their child's criminal behavior?

Williams v. Garcetti, *20 Cal. Rptr. 2d 341 (Cal. 1993), Opinion by: Mosk, J.*

Between 1979 and 1988, California Penal Code section 272 provided, in relevant part,

> Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Sections 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto . . . is guilty of a misdemeanor . . .

In 1988 the legislature appended a sentence to section 272: "For purposes of this section, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child." This amendment is the object of the present lawsuit.

As part of the bill that included the amendment, the legislature established a parental diversion program. Under specified circumstances, the probation department may recommend the diversion of parents or guardians (hereafter collectively referred to as parents) charged under section 272 to an education, treatment, or rehabilitation program prior to trial. Satisfactory completion of the program results in dismissal of the criminal charges.

Plaintiffs, as taxpayers, filed a complaint . . . to halt the enforcement of the amendment, claiming it would constitute a waste of public funds. . . . The grounds of the complaint were that the amendment was unconstitutionally vague, overbroad, and an impingement on the right to privacy.

Issue

The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7). Under both Constitutions, due process of law in this context requires two elements: a criminal statute must "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." According to the foregoing principles, the amendment is not sufficiently specific unless a parent of ordinary intelligence would understand the nature of the duty of "reasonable care, supervision, protection, and control" referred to therein, as well as what constitutes its omission. Plaintiffs contend the amendment changed the law by creating a new—and impermissibly vague—parental duty as a basis for criminal liability. . . .

Reasoning

The legislature enacted the amendment and the related parental diversion program as part of the Street Terrorism Enforcement and Prevention Act, the premise of which was that "the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." The act included measures establishing criminal penalties for gang participation and allowing sentence enhancements for gang-related conduct; defining certain buildings in which gang activities take place as nuisances subject to injunction, abatement, or damages; and prohibiting terrorist threats of death or great bodily injury.

Viewed in the context of the act, that is, as part of its broad scheme to alleviate the problems caused by street gangs, the amendment to section 272 and the parental diversion program appear intended to enlist parents as active participants in the effort to eradicate such gangs. . . . Our inquiry is whether a parental duty of "reasonable care, supervision, protection, and control" is sufficiently certain to meet constitutional due process requirements.

Our Legislature is not unique in addressing the problem of juvenile delinquency by making a parent criminally

liable when the parent's failure to supervise or control a child results in the child's delinquency. "Holding parents responsible for juvenile delinquency is not a new concept. Colorado enacted the first law holding parents criminally liable for their children's delinquent acts in 1903." . . . A New York statute provides, "A person is guilty of endangering the welfare of a child when . . . a parent, guardian or other person legally charged with the care or custody of a child . . . fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision.'" . . .

Plaintiffs do not dispute that parents' legal responsibilities in regard to the "care" and "protection" of their children—focusing on forces external to the child that affect the child's own welfare—are well established and defined. For example, Welfare and Institutions Code section 300 contains a lengthy list of conditions under which a minor can be removed from the custody of a parent and declared a dependent child of the court (e.g., sexual abuse or cruelty). We agree with the court of appeal that section 300 provides guidelines sufficiently specific to delineate the circumstances under which a child will qualify for dependent status and thus to define the parental duty of care and protection that would prevent the occurrence of those circumstances.

Accordingly, we confine the balance of our analysis to section 272 as applied to juvenile delinquency through Welfare and Institutions Code sections 601 and 602, and to the "supervision" and "control" elements of the duty identified in the amendment. The terms "supervision" and "control" suggest an aspect of the parental duty that focuses on the child's actions and their effect on third parties. This aspect becomes plain when the amendment is read in conjunction with Welfare and Institutions Code sections 601 and 602. Section 601, subdivision (a), brings within the jurisdiction of the juvenile court any minor who, "violated any ordinance of any city or county of this state establishing a curfew. . . ." Subdivision (b) of section 601 brings within the jurisdiction of the juvenile court minors for whom "the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities. . . ." Section 602 brings within the jurisdiction of the juvenile court any minor who "violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime. . . ."

According to its preamendment language, section 272 thus imposes misdemeanor liability on any person whose act or omission causes or encourages a child to violate a curfew, be habitually truant, or commit a crime—i.e., to engage in delinquent acts. . . . The amendment here at issue provides more explicitly that parents violate section 272 when they omit to perform their duty of reasonable "supervision" and "control" and that omission results in the child's delinquency. Therefore, the Legislature must have intended the "supervision" and "control" elements of the amendment to describe parents' duty to reasonably supervise and control their children so that the children do not engage in delinquent acts. . . . We understand the amendment to describe the duty of reasonable restraint of, and discipline for, a child's delinquent acts by parents who know or should know that their child is at risk of delinquency and that they are able to control the child. . . . A parent who makes reasonable efforts to control a child but is not actually able to do so does not breach the duty of control. . . .

It is true that neither the amendment nor prior case law sets forth specific acts that a parent must perform or avoid in order to fulfill the duty of supervision and control. We nonetheless find the duty to be sufficiently certain even though it cannot be defined with precision. . . . We agree with defendants that it would be impossible to provide a comprehensive statutory definition of reasonable supervision and control. The concept of reasonableness serves as a guide for law-abiding parents who wish to comply with the statute.

In sum, we understand the Legislature to have intended the amendment to provide that there is a duty of reasonable restraint of, and discipline for, a child's delinquent acts by parents who know or should know that their child is at risk of delinquency and that they are able to control the child. Parents who intentionally or with criminal negligence fail to perform this duty, and as a result contribute to the delinquency of the child, violate section 272. The amendment does not trap the innocent. It provides adequate notice to parents with regard to potential criminal liability for failure to supervise and control their children because . . . it imposes criminal liability only when the parent engages in conduct that so grossly departs from the standard of care as to amount to criminal negligence.

The causation element of section 272 also reduces the likelihood of arbitrary or discriminatory enforcement.

A parent will be criminally liable only when his or her criminal negligence with regard to the duty of reasonable supervision and control "causes or tends to cause or encourage" the child to come within the provisions of Welfare and Institutions Code sections 601 or 602. It is true that the causation element of section 272 could be more difficult to apply when the question is whether a parent's failure to supervise or control a child caused the child to become delinquent than when the parent's potentially culpable conduct is of a more direct nature—for example, when the parent is an accomplice of the minor in the commission of a crime. . . . However, the opportunity for parental diversion from criminal prosecution under section 272 in less serious cases suggests that as a practical matter a parent will face criminal penalties under section 272 for failure to supervise only in those cases in which the parent's culpability is great and the causal connection correspondingly clear.

Holding

Although the amendment calls for sensitive judgment in both enforcement and adjudication, we would not be justified in assuming that police, prosecutors, and juries are unable to exercise such judgment.

Questions for Discussion

1. Describe how the 1988 amendment modified the California Statute. What was the harm that the statute was designed to combat? Why do the plaintiffs contend that the law is unconstitutional?
2. As a prosecutor, what difficulties might arise in enforcing this statute?
3. Do you believe that the law is too vague to inform a parent of the steps that are required under the statute? What action does the law require a parent to undertake who suspects that his or her child is involved in criminal activity in a gang?
4. Does the California law punish parents for the acts of their children that they cannot possibly know about or prevent?

See more cases on the study site: State v. Akers, *www.sagepub.com/lippmanccl2e*

Chapter Summary

We have seen that under the common law there were four parties to a crime. The procedural requirements surrounding the prosecution of parties developed by judges were intended to impede the application of the death penalty. Today there are two parties to a crime:

- *Accomplices*. Individuals participating before and during a crime
- *Accessories*. Individuals involved following a crime

The *actus reus* of accomplice liability is described as "aiding," "abetting," "encouraging," and "commanding" the commission of a crime. This is satisfied by even a small degree of material or psychological assistance. Mere presence is not sufficient. The *mens rea* of accomplice liability is typically described as the intent to assist the primary party to commit the offense with which he or she is charged. Some judges have argued for a knowledge standard, but other courts have recognized liability based on recklessness. The criminality of an accessory after the fact is distinguished from that of accomplices by the fact that the legal guilt of an accessory after the fact is not derived from the primary crime. Instead, accessory after the fact is now considered a separate and minor offense involving an intent and an act undertaken with the purpose of hindering the detection, apprehension, prosecution, conviction, or punishment of the individual receiving assistance.

Strict liability holds an individual liable based on the commission of a criminal act while dispensing with the requirement of a criminal intent. Vicarious liability imposes liability on an individual for the criminal act of another. A corporate officer or corporation may be held vicariously liable under a statute where there is a legislative intent to impose vicarious liability for the act of an employee or corporate agent. This typically arises in the case of strict liability offenses that are punishable by a fine and are intended to protect the societal health, safety, and welfare. Vicarious liability is extended to the owners of automobiles for traffic tickets based on their legal title to the car and the interest in efficiently processing tickets. Parents, under some state statutes, are held vicariously liable for the criminal conduct of their children based on their status relationship.

Chapter Review Questions

1. What were the four categories of common law parties? How does this differ from the modern categorization of parties?
2. Illustrate the definition of common law accomplices and accessories using the example of a bank robbery. Should accomplices be held liable for the same crime as the primary perpetrator of the crime?
3. What *actus reus* is required for an accomplice? Provide some illustrations of acts satisfying the *actus reus* requirement. What is the mere presence rule? Is there an exception to the mere presence rule?
4. Discuss the *mens rea* of accomplice liability. Distinguish this from the minority position that "knowledge" is sufficient. How would these two approaches result in a different outcome in a case? Which approach do you favor?
5. What are the requirements for an individual to be considered an accessory after the fact? Is this considered as serious a criminal violation as that of being an accomplice?
6. Distinguish accomplice liability, strict liability, and vicarious liability.
7. How does the language of a statute determine whether a corporation may be held vicariously liable? What are the two primary tests for determining corporate liability? Discuss some of the arguments for and against the vicarious liability of corporations.

8. What constitutional considerations are involved in holding the owner of an automobile vicariously liable for the traffic tickets issued to the car?
9. Is it constitutional to hold parents strictly and vicariously liable for the criminal acts of their children? In your view, are there any situations in which parents should or should not be held vicariously liable?
10. Write a brief essay summarizing the law of parties.

Legal Terminology

accessories
accessories after the fact
accessories before the fact
accomplices
corporate liability
derivative liability
mere presence rule
natural and probable consequences
parental responsibility laws
parties to a crime
Pinkerton rule
principals in the first degree
principals in the second degree
social host liability laws
strict liability
teen party ordinances
vicarious liability

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read about social host laws and other laws imposing vicarious responsibility for criminal offenses involving alcohol.
2. Learn about civil and criminal vicarious liability for fraternity hazing.

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Herbert L. Packer, *The Limits of the Criminal Sanction* (Palo Alto, CA: Stanford University Press, 1968), pp. 121–131. An interesting discussion of the decline in the traditional standards for judging criminal liability and the increasing reliance on strict and vicarious liability.

Rollin M. Perkins and Ronald N. Boyce, *Criminal Law,* 3rd ed. (Mineola, NY: Foundation Press, 1982), pp. 718–769, 911–914. An outline of the history and development of the law of parties and of the criminal liability of corporations.

Richard G. Singer and John Q. La Fond, *Criminal Law Examples and Explanations,* 2nd ed. (New York: Aspen, 2001), pp. 99–119, 329–359. A good summary of the law of parties with accompanying review questions.

7 Attempt, Conspiracy, and Solicitation

Did Dwight Ralph Smallwood intend to kill his victims?

On August 29, 1991, Dwight Ralph Smallwood was diagnosed as being infected with the human immunodeficiency virus (HIV). . . . On September 26, 1993, Smallwood and an accomplice robbed a woman at gunpoint and forced her into a grove of trees where each man alternately placed a gun to her head while the other one raped her. On September 28, 1993, Smallwood and an accomplice robbed a second woman at gunpoint and took her to a secluded location, where Smallwood inserted his penis into her with "slight penetration." On September 30, 1993, Smallwood and an accomplice robbed yet a third woman, also at gunpoint, and took her to a local school where she was forced to perform oral sex on Smallwood and was raped by him. In each of these episodes, Smallwood threatened to kill his victims if they did not cooperate or to return and shoot them if they reported his crimes. Smallwood did not wear a condom during any of these criminal episodes. . . . Based upon his attack on September 28, 1993, Smallwood was charged with, among other crimes . . . attempted second-degree murder of each of his three victims.

Core Concepts and Summary Statements

Introduction

Inchoate or "beginning" crimes provide that individuals can be convicted and punished for an intent to commit a crime when this intention is accompanied by a significant step toward the commission of the crime.

Attempt

A. An attempt requires a purpose to commit a crime, an act toward the commission of the crime, and a failure to commit the crime.
B. The objective approach to criminal attempts requires an act that is proximate to the commission of a crime. The subjective test requires only an act that is sufficiently close to the completion of a crime to establish a criminal intent.
C. The Model Penal Code requires an act that is a substantial step toward the commission of a crime.
D. Factual impossibility is not a defense to an attempt to commit a crime. Legal impossibility and inherent impossibility constitute defenses.
E. The affirmative defense of abandonment arises in those instances in which an individual commits an attempt and abandons his or her effort under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose. This renunciation must not result from extraneous or outside factors.

Conspiracy

A. The majority rule is that the *mens rea* of conspiracy is an intent or purpose that the object of the conspiracy is achieved.
B. The *actus reus* of conspiracy consists of entering into an agreement to commit a crime. An overt act in furtherance of the conspiracy is required under modern statutes.
C. States follow either a bilateral or unilateral approach to an agreement between the parties to a conspiracy.
D. The structure of conspiracies is described as either a "wheel" or a "chain."
E. Conspirators are liable for all criminal acts committed in furtherance of a conspiracy. Under Wharton's rule, a conspiracy cannot arise between two parties in those instances in which the voluntary participation of two parties is required to commit the crime.
F. The *Gebardi* rule provides that an individual who is in a class of protected persons and is not liable under a statute may not be liable for a conspiracy to violate the law.

Solicitation

A written or verbal statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another to commit a crime with the purpose that the other person commit a crime. A solicitation is complete the moment the statement is made; it need not be communicated.

Introduction

We live in fear of a terrorist bombing or hijacking and certainly do not want to wait for an attack to occur before arresting terrorists. On the other hand, at what point can we be confident that individuals are intent on terrorism?

Inchoate or "beginning" crimes provide that individuals can be convicted and punished for an intent to commit a crime when this intent is accompanied by a significant step toward the commission of the offense. At this point, society is confident that the individual presents a threat and is justified in acting to protect itself. There are three **inchoate crimes**:

- *Attempt* punishes an unsuccessful effort to commit a crime.
- *Conspiracy* punishes an agreement to commit a crime and an overt act in furtherance of this agreement.
- *Solicitation* punishes an effort to persuade another individual to commit a crime.

The conviction of an individual for an inchoate crime requires

- a specific intent or purpose to accomplish a criminal offense, and
- an act to carry out the purpose.

Individuals who commit inchoate offenses may be punished less severely than or as severely as they would have been punished if they had completed the crime that was the object of the attempt, conspiracy, or solicitation.

Attempt

Professor George Fletcher notes that attempts are failures. A sniper misses an intended victim, two robbers are apprehended as they enter a store, and a pickpocket finds that the victim's pocket is empty. In this section, we will ask at what point an **attempt** is subject to criminal punishment. Must we wait until a bullet misses its mark and whistles past the head of an intended victim to arrest the shooter? What defenses are available? May a pickpocket plead that the intended victim's pocket was empty?

There are two types of attempts: **complete attempt** (but "imperfect") and **incomplete attempt**. A complete, but imperfect, attempt occurs when an individual takes every act required to commit a crime and yet fails to succeed. An example is an individual firing a weapon and missing the intended victim. In the case of an incomplete attempt, an individual abandons or is prevented from completing a shooting due to the arrival of the police or as a result of some other event outside his or her control. A third category that we should mention is the *impossible attempt.* This arises where the perpetrator makes a mistake, such as aiming and firing the gun only to realize that it is not loaded. You should keep these categories in mind as you read the cases on attempt.[1]

Judges and lawyers, as we mentioned, disagree over how far an individual must progress toward the completion of a crime to be held legally liable for an attempt. It is only when an assailant pulls the trigger that we can be confident that he or she possesses an intent to kill or to seriously wound a potential victim. Yet, the longer we wait to arrest an individual, the greater the risk that he or she may carry out the crime and wound or kill a victim. At what point do you believe the police are entitled to arrest a potential assailant?

In *People v. Miller,* Miller, while slightly inebriated, threatened to kill Albert Jeans. Miller appeared that afternoon on a farm owned by Sheriff Ginochio where Jeans worked. Miller was carrying a .22-caliber rifle and walked toward Ginochio, who was 250 or 300 yards in the distance. Jeans stood roughly thirty yards behind Ginochio. The defendant walked about one hundred yards, stopped, appeared to load his rifle, and then continued to walk toward Ginochio, who seized the weapon from Miller without resistance. Jeans, as soon as he saw Miller, fled on a right angle to Miller's line of approach, but it is not clear whether this occurred before or after Miller

crouched and appeared to place a bullet in the rifle. The firearm was loaded with a high-speed cartridge. At no time did Miller raise and aim his rifle. Was this sufficient for an attempt? What was Miller's intent, to frighten Jeans or to kill him? Should we consider Jeans's reaction in determining Miller's guilt? Consider the presence of Ginochio in formulating your view. Would you hold Miller liable for an attempt to kill Jeans? Should an attempt be punished to the same extent as the actual offense? Do you believe that the resources of the legal system should be devoted to prosecuting Miller under the circumstances?[2]

History of Attempt

Scholars and philosophers dating back to the ancient Greeks have wrestled with the appropriate punishment for an attempted crime. After all, an attempt arguably does not result in any harm. In 360 B.C., the famous Greek philosopher Plato argued that an individual who possesses "the purpose and intention to slay another . . . should be regarded as a murderer and tried for murder." Plato, however, also recognized that an attempt does not result in the death of the victim and that banishment rather than the death penalty would be an appropriate penalty. [3]

The early common law did not punish attempts. Henry of Bracton explained this by asking, "What harm did the attempt cause, since the injury took no effect?"[4] English law, rather than relying on the prosecution of attempts to prevent and punish the first steps toward crime, adopted laws against unlawful assemblies, walking at night, and unemployed persons wandering in the countryside, as well as other prohibitions on activities that may result in crime, such as keeping guns or crossbows in the house, lying in wait, or drawing a sword to harm a judge. Gaps in the law were filled by the Court of Star Chamber, which was authorized by the king to maintain order by modifying common law rules where necessary. These were volatile and violent times, and the Star Chamber began to introduce the concept of attempts into the law by punishing threats and verbal confrontations that were likely to escalate into armed confrontations, challenges, and attempts to enter into duels. In 1614, Sir Francis Bacon prosecuted a case before the Star Chamber for dueling in which he argued that acts of preparation for a sword fight should be punished in order to discourage armed confrontations.

The law of attempt was finally recognized by the common law in the important decision of *Rex v. Scofield* in 1784. The defendant was charged with placing a lighted candle and combustible material in a house with the intent of burning down the structure. Lord Mansfield, in convicting the defendant, stressed the importance of intent, writing that "the intent may make an act, innocent in itself, criminal. . . . Nor is the completion of an act, criminal in itself, necessary to constitute criminality."[5] In 1801, the law of attempt was fully accepted in the case of *Rex v. Higgins,* which involved the indictment of an individual for urging a servant to steal his master's goods. The court proclaimed that "all offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." This common law rule was subsequently accepted by courts in the United States, which ruled that it was a misdemeanor to attempt to commit any felony or misdemeanor.[6]

Public Policy and Attempt

Why punish an act that does not result in the successful commission of a crime? There are at least three good reasons:

- *Retribution*. An individual who shoots and misses or makes efforts to commit a murder is as morally blameworthy as a successful assailant. Success or failure may depend on unpredictable factors, such as whether the victim moved to the left or to the right or whether the police happened to drive by the crime scene.
- *Utility*. The lesser punishment for attempt provides an incentive for individuals to halt before completing a criminal act in order to avoid being subjected to a harsher punishment.
- *Incapacitation*. The individual has demonstrated that he or she poses a threat to society.

The Elements of Criminal Attempt

Criminal attempt comprises three elements:

- an intent or purpose to commit a crime,
- an act or acts toward the commission of the crime, and
- a failure to commit the crime.

A general attempt statute punishes an attempt to commit any criminal offense. Other statutes may be directed at specific offenses, such as an attempt to commit murder, robbery, or rape. The Wyoming statute reprinted below is an example of a state statute punishing criminal attempts.

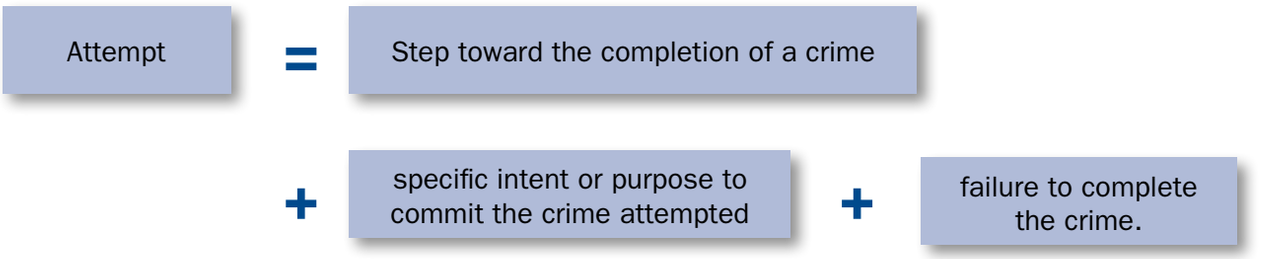
The Statutory Standard

Wyoming Statutes Annotated Section 6-1-301(a)(i). Attempt . . .

A person is guilty of an attempt to commit a crime if:

(i) With the intent to commit the crime, he does any act which is a substantial step towards commission of the crime. A "substantial step" is conduct which is strongly corroborative of the firmness of the person's intention to complete the commission of the crime; or. . . .

The Legal Equation



Mens Rea of Attempt

A criminal attempt involves a dual intent.

- An individual must intentionally perform acts that are proximate to the completion of a crime.
- An individual must possess the specific intent or purpose to achieve a criminal objective.

In the case of an individual accused of attempted murder, the prosecution must demonstrate that (1) the defendant intentionally aimed and engaged in an act toward the shooting of the arrow, and (2) this was undertaken with the intent to kill a hunter walking on the trail. A defendant who did not notice the hunter and lacked the intent to kill would not be held liable for attempted premeditated murder.[7] As noted by an Illinois appellate court, "a finding of specific intent to kill is a necessary element of intent to kill."[8]

The commentary to the Model Penal Code offers the example of an individual who detonates a bomb with the purpose of demolishing a building knowing that people are inside. In the event that the bomb proves defective, the commentary notes that the defendant likely would not be held responsible for attempted murder, because his or her purpose was to destroy the building rather than to kill the individuals inside the structure. The Model Penal Code section 5.01(1)(b) adopts a broad approach to intent and argues that when a defendant knows that death is likely to result from the destruction of the building, it is appropriate to hold him or her liable for attempted murder.[9]

In *Smallwood v. State,* a Maryland Court of Appeals was confronted with the issue of whether a rapist with HIV was guilty of an attempt to murder his victims. In reading this case, consider whether it makes sense to limit the intent for attempt to purpose. Is purpose too difficult a standard to satisfy? Should knowledge also result in criminal liability?

The Statutory Standard

Consider the broad approach to a criminal intent in Iowa.

Iowa Code Section 707.11. Attempt to Commit Murder

> A person commits a . . . felony when, with the intent to cause the death of another person . . . the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person. . . .

Did Smallwood possess the intent to kill through the transmission of HIV?

Smallwood v. State, *680 A.2D 512 (CT. APP. MD. 1996), Opinion by: Murphy, J.*

Facts

On August 29, 1991, Dwight Ralph Smallwood was diagnosed as being infected with the human immunodeficiency virus (HIV). According to medical records from the Prince George's County Detention Center, he had been informed of his HIV-positive status by September 25, 1991. In February 1992, a social worker made Smallwood aware of the necessity of practicing "safe sex" in order to avoid transmitting the virus to his sexual partners, and in July 1993, Smallwood told health care providers at Children's Hospital that he had only one sexual partner and that they always used condoms. Smallwood again tested positive for HIV in February and March of 1994.

On September 26, 1993, Smallwood and an accomplice robbed a woman at gunpoint, and forced her into a grove of trees where each man alternately placed a gun to her head while the other one raped her. On September 28, 1993, Smallwood and an accomplice robbed a second woman at gunpoint and took her to a secluded location, where Smallwood inserted his penis into her with "slight penetration." On September 30, 1993, Smallwood and an accomplice robbed yet a third woman, also at gunpoint, and took her to a local school where she was forced to perform oral sex on Smallwood and was raped by him. In each of these episodes, Smallwood threatened to kill his victims if they did not cooperate or to return and shoot them if they reported his crimes. Smallwood did not wear a condom during any of these criminal episodes.

Based upon his attack on September 28, 1993, Smallwood was charged with, among other crimes, attempted first-degree rape, robbery with a deadly weapon, assault with intent to murder, and reckless endangerment. In separate indictments, Smallwood was also charged with the attempted second-degree murder of each of his three victims. On October 11, 1994, Smallwood pled guilty in the Circuit Court for Prince George's County to attempted first-degree rape and robbery with a deadly weapon. The circuit court also convicted Smallwood of assault with intent to murder and reckless endangerment based upon his September 28, 1993, attack, and it convicted Smallwood of all three counts of attempted second-degree murder.

Following his conviction, Smallwood was sentenced to concurrent sentences of life imprisonment for attempted rape, twenty years imprisonment for robbery with a deadly weapon, thirty years imprisonment for assault with intent to murder, and five years imprisonment for reckless endangerment. The circuit court also imposed a concurrent thirty-year sentence for each of the three counts of attempted second-degree murder. The circuit court's judgments were affirmed in part and reversed in part by the Court of Special Appeals, which found that the evidence was sufficient for the trial court to conclude that Smallwood intended to kill his victims and upheld all of his convictions. . . .

Issue

Smallwood asserts that the trial court lacked sufficient evidence to support its conclusion that he intended to kill his three victims. Smallwood argues that the fact that he engaged in unprotected sexual intercourse, even though he knew that he carried HIV, is insufficient to infer an intent to kill. The most that can reasonably be inferred, Smallwood contends, is that he is guilty of recklessly endangering his victims by exposing them to the risk that they would become infected themselves. The State disagrees, arguing that the facts of this case are sufficient to infer an intent to kill. The State likens Smallwood's HIV-positive status to a deadly weapon and argues that engaging in unprotected sex when one is knowingly infected with HIV is equivalent to firing a loaded firearm at that person.

Reasoning

HIV is a retrovirus that attacks the human immune system, weakening it, and ultimately destroying the body's capacity to ward off disease. We also noted that the virus may reside latently in the body for periods as long as ten years or more, during which time the infected person will manifest no symptoms of illness and function normally. HIV typically spreads via genital fluids or blood transmitted from one person to another through sexual contact, the sharing of needles in intravenous drug use, blood transfusions, infiltration into wounds, or from mother to child during pregnancy or birth. . . . AIDS . . . is the condition that eventually results from an immune system gravely impaired by HIV. Medical studies have indicated that most people who carry the virus will progress to AIDS. AIDS patients by definition are profoundly immuno-compromised; that is, they are prone to any number of diseases and opportunistic infections that a person with a healthy immune system might otherwise resist. AIDS is thus the acute clinical phase of immune dysfunction. . . . AIDS is invariably fatal. In this case, we must determine what legal inferences may be drawn when an individual infected with the HIV virus knowingly exposes another to the risk of HIV infection and the resulting risk of death by AIDS.

As we have previously stated, the required intent in the crimes of assault with intent to murder and attempted murder are the specific intent to murder, that is, the specific intent to kill under circumstances that would not legally justify or excuse the killing or mitigate it to manslaughter . . . Smallwood . . . was properly found guilty of attempted murder and assault with intent to murder only if there was sufficient evidence from which the trier of fact could reasonably have concluded that Smallwood possessed a specific intent to kill at the time he assaulted each of the three women. . . .

The State argues that Smallwood similarly knew that HIV infection ultimately leads to death and that he knew that he would be exposing his victims to the risk of HIV transmission by engaging in unprotected sex with them. Therefore, the State argues, a permissible inference can be drawn that Smallwood intended to kill each of his three victims. . . .

Death by AIDS is clearly one natural possible consequence of exposing someone to a risk of HIV infection, even on a single occasion. It is less clear that death by AIDS from that single exposure is a sufficiently probable result to provide the sole support for an inference that the person causing the exposure intended to kill the person who was exposed. While the risk to which Smallwood exposed his victims when he forced them to engage in unprotected sexual activity must not be minimized, the State has presented no evidence from which it can reasonably be concluded that death by AIDS is a probable result of Smallwood's actions to the same extent that death is the probable result of firing a deadly weapon at a vital part of someone's body. Without such evidence, it cannot fairly be concluded that death by AIDS was sufficiently probable to support an inference that Smallwood intended to kill his victims in the absence of other evidence indicative of an intent to kill.

In this case, we find no additional evidence from which to infer an intent to kill. Smallwood's actions are wholly explained by an intent to commit rape and armed robbery, the crimes for which he has already pled guilty. For this reason, his actions fail to provide evidence that he also had an intent to kill. . . . Smallwood's knowledge of his HIV-infected status provides the only evidence in this case supporting a conclusion that he intended anything beyond the rapes and robberies for which he has been convicted. . . .

The evidence in *State v. Haines,* 545 N.E.2d 834 (Ind. App. 1989), contained both statements by the defendant demonstrating intent and actions solely explainable as attempts to spread HIV. There, the defendant's convictions for attempted murder were upheld where the defendant slashed his wrists and sprayed blood from them on a police officer and two paramedics, splashing blood in their faces and eyes. Haines attempted to scratch and bite them and attempted to force blood-soaked objects into their faces. During this altercation, the defendant told the officer that he should be left to die because he had AIDS, that he wanted to "give it to him," and that he would "use his wounds" to spray the officer with blood. Haines also "repeatedly yelled that he had AIDS, that he could not deal with it and that he was going to make [the officer] deal with it." . . .

Holding

We have no trouble concluding that Smallwood intentionally exposed his victims to the risk of HIV infection. The problem before us, however, is whether knowingly exposing someone to a risk of HIV infection is by itself sufficient to infer that Smallwood possessed an intent to kill. . . .

Questions for Discussion

1. Why does the court conclude that Smallwood lacked a specific intent to kill? As a prosecutor, what arguments would you present in support of the contention that Smallwood, in fact, possessed a specific intent to kill? What additional evidence might you present to persuade the court to affirm Smallwood's conviction?
2. As a juror, would you vote to convict or to acquit Smallwood?

Cases and Comments

Intent to Kill. The defendant, Coulverson, was charged with the attempted murder of the eighty-one-year-old victim. Coulverson unexpectedly arrived to visit the victim, who gave Coulverson money to purchase her a sandwich. Coulverson left and reappeared an hour later. The victim was eating lunch in her apartment when Coulverson began to hit the victim in the head with a barbell Coulverson had hidden in her jacket. The victim fled to the bedroom, where the defendant again struck her in the head and yelled "give me your money." The victim gave Coulverson the pouch in which she kept money and the defendant removed over $50. Coulverson stood and counted the money as the victim lay on the floor "bleeding like a hog." The defendant pulled the telephone connection out of the wall and fled. The victim was bleeding profusely but was able to reconnect the phone and call her pastor, who found that the apartment was full of blood in the hallway, bedroom, living room, and bathroom. Paramedics discovered seven one-inch cuts on the victim's scalp, gave her oxygen and an IV, and hospitalized her for three days. An Ohio appellate court affirmed Coulverson's conviction for attempted murder, finding that a jury could have reasonably determined that Coulverson possessed a specific intent to kill based on the fact that the "natural and probable consequence of her acts was to produce death." Did the defendant possess an intent to kill the victim? See *State v. Coulverson,* 202 Ohio 1324 (Ohio App. 2002).

You Decide

7.1 Jarmaal Smith challenges the sufficiency of the evidence to support his conviction for two counts of attempted murder. On February 18, 2000, Karen A. drove her boyfriend, Renell T., Sr. (Renell), to a friend's house on Greenholme Lane in Sacramento, California. Renell was seated in the front passenger seat, and their three-month-old baby, Renell T., Jr., was secured in an infant car seat in the back seat directly behind Karen. Karen parked alongside the curb on the street in front of the house, and Renell got out of the car. As Karen waited in the car to ensure that Renell's friend was home, she spotted Smith in her rearview mirror approaching the automobile. Karen had last talked to Smith eight to nine months earlier, and he had told her that the next time he saw her that he would "slap the shit out of [her]." Defendant walked up to the open front passenger window of Karen's car, looked inside and said, "Don't I know you, bitch?" Renell walked back toward the car and defendant responded by lifting his shirt to display a handgun tucked in his waistband. Renell said, "It is cool," and backed away from defendant. As Renell returned to the car, a group of men on the street corner began approaching the car, and the defendant and the other men began hitting him.

As Renell reentered the car, Karen started to pull away from the curb. After moving roughly one car length, she looked in her rearview mirror and saw Smith standing "straight behind" her holding a gun. She heard a single gunshot, and the bullet shattered the rear windshield, narrowly missed Karen and her baby, passed through the driver's head rest, and lodged in the driver's side door. Renell testified that the defendant had a .38-caliber pistol in his possession. After the shooting, a Sacramento County deputy sheriff searched defendant's room at his mother's home and recovered two .38-caliber shell casings. The jury convicted Smith of two counts of attempted murder and he was sentenced to two 27-year prison terms, which were to be served concurrently.

Was the jury justified in convicting Smith of the attempted murder of Karen and of the attempted murder of Karen's baby? See *People v. Smith,* 124 P.3d 730 (Cal. 2005).

You can find the answer at www.sagepub.com/lippmanccl2e

Actus Reus of Attempt

There are two steps in considering the *actus reus* of attempt. First, determine the legal test to be applied. Second, apply the legal test to the facts.

The often-confusing legal tests reflect two different approaches to attempt. The **objective approach to criminal attempt** requires an act that comes extremely close to the commission of the crime. An arsonist, for instance, must spread kerosene on the ground surrounding a house and then strike a match to ignite the fire. At this point, although the match may be blown out by the wind, we can be confident that the defendant possesses the intent to commit arson and is determined to act on this desire. The fact that the arsonist went so far as to light the match also confirms that the defendant poses a threat to society. This objective approach distinguishes **preparation**, or the planning and purchasing of the materials to commit arson, from acts taken to perpetrate the crime, such as spreading the kerosene and lighting the match.

The **subjective approach to criminal attempt** focuses on an individual's intent rather than on his or her acts. This approach is based on the belief that society should intervene as soon as an individual who possesses the required intent takes an act toward the commission of a crime.

The intent may be revealed by an individual's statements or actions. The subjective approach dictates that the police arrest an arsonist as soon as the individual approaches the crime scene with the kerosene and matches. At this point, we can be fairly certain that the individual poses a threat to society. Critics point out that this early intervention fails to provide individuals with the opportunity to change their mind and risks punishing individuals for bad thoughts who may never, in fact, engage in bad acts.

The objective approach stresses the danger posed by a defendant's acts; the subjective approach focuses on the danger to society presented by a defendant who possesses a criminal intent.

In considering these two perspectives, review *People v. Miller* in the introductory section on the law of attempt. Now consider which approach you would adopt in analyzing whether the two twelve-year-old girls in *State v. Reeves* are guilty of attempted murder. Molly and Tracie agreed to poison their teacher, Janice Geiger, and then steal her car. They shared their scheme with an older high school student the night before the planned murder and were unable to persuade him to drive them to the mountains in Geiger's automobile. Later, Molly revealed the plan to a student named Mary while on the bus to school and went so far as to show Mary a packet of rat poison. Mary informed Janice Geiger of the plan, and during homeroom Geiger observed the two girls lean over her desk, giggle, and run back to their seats. Geiger also noticed a purse lying next to her coffee cup on the desk and arranged for Molly to be called to the principal's office, where rat poison was found in the purse.

Were Molly and Tracie liable for an attempt to kill Janice Geiger? At what point did they cross the line from preparing to poison Ms. Geiger to attempting to poison Ms. Geiger? When they entered the school? When they approached the desk? Should we wait until the poison is actually placed in the coffee cup? Is the best approach to emphasize the defendants' acts (objective approach) or intent (subjective approach)?[10]

Three Legal Tests

There are three major legal tests for the *actus reus* of attempt. All three ask whether an individual's actions so clearly indicate an intent to commit a crime that we can confidently charge him or her with an attempt.

- *Physical Proximity to the Commission of a Crime.* The defendant's acts come close to completing the crime. The focus is on the remaining steps required to complete the crime.
- *Unequivocality or Clarity of Purpose to Commit a Crime.* Without any other information, an ordinary person looking at the defendant's acts would conclude without a doubt that the defendant intends to commit the crime..
- *Model Penal Code or Substantial Step Toward the Commission of a Crime*. The defendant's acts are sufficient to clearly indicate that he or she possesses an intent to commit the crime.

At common law, the first steps toward the commission of a crime were considered mere preparation and did not constitute an attempt. The common law followed the **last step approach** and provided that an attempt occurred only following the completion of the final step required for the commission of a crime. In other words, an attempted arson required that an individual actually ignite a fire before he or she could be arrested for attempt. In an attempted murder, the assailant must pull the trigger only to miss the target or to find that the gun is unloaded.

The modern **physical proximity test** is employed by some state courts and is slightly less demanding than the last step approach. The physical proximity test follows an objective approach and provides that an attempt occurs when an act is "very near" or "dangerously close" to the completion of a crime. An individual must possess the immediate ability to complete the crime or, in the words of the courts, the act must "amount to the commencement of the consummation." Under this test, the arsonist would be required to spread the kerosene on the building and to strike a match. The killer must aim a rifle at the victim and have the victim within the sights of his or her rifle. There is good reason to believe at that point the arsonist or killer intends to take the final steps required to commit the crime.

The **unequivocality test** or clarity test, or ***res ipsa loquitur*** ("the thing speaks for itself"), asks whether an ordinary individual observing the defendant's acts would conclude that the defendant clearly and indisputably intends to commit a crime. The focus is on what an individual has "already done." The defendant's statements to the police or to other persons are not considered in this analysis. The moment the arsonist arrives at the crime scene with the necessary

materials, most people would conclude that the defendant possesses a clear intent and is guilty of an attempted arson. This test is criticized for lacking clear guidelines and providing jurors with considerable discretion.

The Model Penal Code **substantial step test** simplifies matters by providing an understandable and easily applied test for attempt. The Model Penal Code states that to constitute an attempt, an act must be a *clear step* toward the commission of a crime. *This step is not required to come close to the completion of the crime itself. The Model Penal Code does state that the act must be "strongly corroborative of the actor's criminal purpose." The focus is on the acts already taken by the defendant toward the commission of the crime.* The code offers a number of factual examples:

- Lying in wait, searching for, or following the contemplated victim of a crime
- Enticing the victim of the crime to go to the place contemplated for its commission
- Surveillance of the site of the contemplated crime
- Unlawful entry of a building or vehicle that is the site of the contemplated crime
- Possession of materials specifically designed for the commission of a crime
- Soliciting an individual to engage in conduct constituting a crime

The Model Penal Code substantial step analysis concentrates on asking whether an individual has taken affirmative acts toward the completion of a crime that, in combination with other evidence, indicates a defendant possesses a criminal intent. These steps are not required to be physically proximate or close to the offense, and there is no firm distinction between preparation and perpetration of a crime. The concern is with detaining dangerous persons rather than with delaying an arrest until an individual comes close to committing a dangerous act.

The Physical Proximity and Substantial Step Tests

You are likely understandably confused by the broad and uncertain nature of the law of attempt. Keep in mind that the fundamental question is whether the law of attempt should be concerned with a defendant's intent or with the proximity of his or her acts to the completion of a crime.

The substantial step test significantly broadens the authority of the police to arrest individuals for an attempt to commit a crime. For instance, the Model Penal Code provides that "lying in wait" and "searching for or following the contemplated victim" satisfies the *actus reus* requirement.

The commentary to the Model Penal Code recognizes that these acts would not satisfy the demanding standard for *actus reus* under the physical proximity test. For example, in *People v. Rizzo,* a New York appellate court rejected that searching for a "contemplated victim" constituted an attempt. In *Rizzo,* four men planned to rob Charles Rao of the payroll that he was scheduled to carry from the bank to his company's offices. The four conspirators, two of whom were armed, drove to the bank and to the firm's various worksites, but failed to find Rao. The four were arrested and subsequently acquitted by a New York appellate court. The court ruled that in searching for Rao, the four men had not progressed beyond preparation and that their acts were not "immediately near" or "dangerously close" to the commission of the crime of robbery, because they had yet to encounter and confront Rao. They clearly could still change their minds. On the other hand, the commentary to the Model Penal Code notes that the defendants' "following, searching," and "lying in wait" with a criminal purpose were sufficiently dangerous to constitute an attempted robbery.[11]

Another illustration of the difference between the substantial step and dangerous proximity tests is *Commonwealth v. Gilliam.* Gilliam was a prisoner at the Dallas State Correctional Institution, and correctional officers discovered that the bars on the window in his cell had been cut and were being held in place by sticks and paper. A search of the cell revealed vise grips concealed inside Gilliam's mattress, and two knotted extension cords attached to a hook were found in a box of clothing. The vise grips were sufficiently strong to cut through the barbed wire along the top of the fence surrounding the prison compound, and the extension cords presumably were to be used to scale the surrounding penitentiary wall. A Pennsylvania superior court ruled that Gilliam's sawing through the bars and gathering of tools indicated a clear intent to escape from prison and constituted a substantial step under the Model Penal Code. The court, however, noted that these same acts would not constitute an attempt under a physical proximity test, because a number of additional steps were required to escape from the prison.[12]

A number of states avoid the complexities of attempt by providing that preparation for specific offenses constitutes a crime. For instance, California Penal Code section 466 provides that

> Every person having upon him or her in his or her possession a picklock, crowbar, keybit . . . or other instrument or tool with intent feloniously to break or enter into any building . . . is guilty of misdemeanor.

The next case, *Bolton v. State,* illustrates the difficulty of determining at what point an individual should be held liable for attempt. Early intervention removes a potentially dangerous individual from the street. This, of course, risks arresting and punishing individuals for crimes that they might never have committed. On the other hand, delaying an arrest until an act is proximate to a crime presents the threat that a crime will have been committed before the police are able to intervene. How would you balance these two competing concerns?

Was the defendant guilty of attempted burglary with the intent to commit sexual assault, or were his acts mere preparation?

Bolton v. State, *07-02-0357-CR (TEX. APP. 2003), Opinion by: Reavis, J.*

Following a plea of not guilty, appellant was convicted by a jury of attempted burglary of a habitation with intent to commit sexual assault, and punishment was assessed by the court at twenty years' confinement. Presenting a sole issue, appellant asserts the evidence is insufficient to support his conviction. Based upon the rationale expressed herein, we . . . reverse and remand for a new trial on punishment.

Facts

At approximately 10:00 p.m. on January 6, 2002, Ramiro Reyna was walking from his home to his mother's home situated one block over when he observed a "suspicious person" walking through complainant's backyard. A street light on the corner lot where complainant's house was located provided some light. Reyna knew that complainant and her mother were the only residents. He observed the person, later identified as appellant, "just peeping" through the kitchen window and later another window. However, Reyna also testified that an eighteen-wheeler was parked on the curb to the side of the house that night, and from where he was standing initially, the truck was between him and appellant, and he was able to observe only the back of appellant's legs. As Reyna proceeded down the block undetected by appellant, he again observed appellant "peeping" through a window, holding his right hand next to his face. Reyna was unable to see appellant's left hand. Once Reyna reached his mother's house, four houses down from complainant's, he called the police.

Reyna testified he was inside his mother's house for three to five minutes after calling the police. He then waited in his mother's back yard where he could still observe complainant's back yard through other neighbors' gates. Although he could not see appellant, he believed appellant was still standing by a window in complainant's back yard, until he noticed appellant return to complainant's back yard from a business parking lot located across the alley from complainant's house. Reyna's mother waited for the police in her front yard, and upon Officer Jordan's arrival, she alerted him to appellant's location. Reyna observed Jordan's patrol car drive down the alley, where Jordan apprehended appellant behind a neighbor's house adjacent to complainant's.

Complainant testified she turned on her bath water, undressed in the bathroom, and took her clothes to the laundry room. She then walked to her mother's room to answer the telephone before returning to the bathroom to take a bath. According to complainant, she bathed for approximately an hour.

Officer Jordan testified he was dispatched to investigate a burglary in progress. . . . After handcuffing appellant, Jordan conducted a protective frisk and discovered an open jar of petroleum jelly in appellant's pocket. The officer also noticed that appellant was wearing camouflage pants that were unbuttoned and unzipped.

Issue

Appellant's sole contention is that the evidence is legally and factually insufficient to support his conviction for attempted burglary of a habitation with intent to commit sexual assault. We agree.

Reasoning

A person attempts an offense if he commits an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. Burglary requires a person to enter a habitation without the effective consent of the owner with the intent to commit a felony, a theft, or an assault. A person commits sexual assault if he intentionally or knowingly

A. causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent;

B. causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

C. causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor. . . .

The State established that appellant was in complainant's backyard without permission and was peeping through more than one window. The arresting officer testified appellant possessed an open jar of petroleum jelly in his pocket and that his camouflage pants were unbuttoned and unzipped. Complainant and her mother testified the window to complainant's room showed new damage. . . . Complainant also testified she had seen appellant before when she and her friends were walking to a nearby grocery store and noticed appellant following them. She explained that when she turned back to look, he stopped, and she did not see him again. However, the State did not establish a time frame between that occurrence and the incident on January 6. . . .

Complainant testified that while she was bathing she did not hear anything outside the window. She further testified she did not see appellant at any of her windows nor elsewhere, nor did she witness him attempt to pull the screen away from the window. According to complainant, she inspected her window every other day when taking out the trash and acknowledged the window was locked on the night of the incident and very difficult to open.

The defense established the window screen was old and dark from rust, and the window frame was broken. No evidence was presented that appellant pulled up the screen or caused any damage to the window. In fact, the only eyewitness, Reyna, testified on direct and redirect examination that when Reyna saw appellant, he was "just peeking through the window."

Referencing the record, in its brief the State notes appellant was "clothed in camouflage pants, which are typically worn when one does not want to be seen." However . . . there is no evidence by Officer Jordan or any other witness establishing that camouflage pants are "worn when one does not want to be seen." Moreover, the State did not argue to the jury, as it does on appeal, that they could reasonably deduce that camouflage clothing is worn by persons who do not want to be seen.

The State also contends it was reasonable for a jury to conclude appellant had a "sexual interest" in complainant, because he had previously followed her while she was walking to a grocery store. However, no evidence was presented of any acts, conduct, or words by appellant to indicate he was sexually interested in complainant.

In support of its final contention that the evidence is sufficient to support appellant's conviction, the State relies on the open jar of petroleum jelly found in appellant's pocket to prove his intent to commit sexual assault. The State cites six cases in which petroleum jelly was used during sexual crimes; however . . . five of the cases relied upon by the State involve sexual acts against minors, and the sixth case was a prosecution for murder resulting from a heinous rape from which the victim sustained fatal injuries. Moreover, no evidence was introduced regarding the amount of petroleum jelly in the jar, if any. The State does not cite any cases, and we have been unable to find any, holding that possession of a jar of petroleum jelly under the circumstances presented here is sufficient to support a conviction for attempted sexual assault, and we decline to so hold.

Additionally, when Officer Jordan first observed appellant, he was leaving complainant's back yard and walking down the alley at a normal pace. . . .

Holding

The record does not establish appellant committed an act amounting to more than mere preparation with the intention to enter complainant's house to commit sexual assault. Proof of a culpable mental state generally relies upon circumstantial evidence and may be inferred from the circumstances under which the prohibited act occurred. . . . However, the circumstances in the underlying case do not establish that through his acts, words, or conduct, appellant had the requisite intent to enter complainant's house to commit sexual assault. . . . Accordingly, we hold the evidence is legally insufficient to support a conviction for attempted burglary of a habitation with intent to commit sexual assault. . . .

Accordingly, the judgment for attempted burglary of a habitation with intent to commit sexual assault is reformed to reflect conviction for the lesser included offense of criminal trespass. . . .

Questions for Discussion

1. What was the legal test for attempt used by the court? List the facts that the prosecutor would rely on to support Bolton's conviction for attempted burglary with the intent to commit sexual assault. What facts would be relied on by the defense? Why did the appellate court reverse the defendant's conviction? How would you rule?
2. Would the court have ruled differently had the prosecution been able to prove that Bolton had stalked the victim earlier? Are there other facts that the prosecution failed to prove that might have led the court to convict the defendant of burglary?
3. As a matter of public policy, do you believe that the criminal law should broadly define attempt and intervene as early as possible to prevent and to punish sexual offenses?
4. Why was the prosecutor not content to charge Bolton with criminal trespass?

Cases and Comments

Indecent Behavior. Earl Thomas Gaspard, thirty-five, was divorced from the mother of his eleven-year-old son, V.G. Gaspard's former wife had custody over V.G., and the child visited his father on weekends. During the visits, the two watched movies depicting nudity and sex acts, and Gaspard gave his son printed material depicting scantily clad women. The defendant told V.G. that he had to watch the films, and that the nudity and sex acts would make V.G.'s sexual organ "hard." The defendant was convicted of an attempt to engage in indecent behavior with a juvenile. A Louisiana Court of Appeals reversed the judgment, pointing out that there was no evidence that Gaspard touched or tried to touch his son or that the two exposed themselves to one another or engaged in sexual acts. The court clarified that the prohibition on indecent behavior with a juvenile prohibits lewd or lascivious acts upon the person or in the presence of any child under the age of seventeen in those instances in which there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person. The Louisiana court pointed out that prior prosecutions for indecent behavior required inappropriate body contact or a repeated course of obscene or indecent acts, such as displays of nudity. These decisions made clear that a single kiss was insufficient.

The Louisiana court ruled that nothing in the record indicates an "act tending directly toward a lewd or lascivious act." The court ruled that the films and printed material constituted mere preparation rather than an attempt. Do you agree? See *State v. Gaspard,* 841 So. 2d 1021 (La. App. 2003).

You Decide

7.2 On June 20, 2002, Jonathan Daughtrey saw two men standing and talking by the back outside corner of the BB&T Bank in Holland, Virginia. The men were later identified as Williams and Cooper. Several minutes later, he viewed them walking toward the bank entrance with bandanas over their faces. Williams was holding a knapsack with his hand inside. As Williams and Cooper walked toward the bank entrance, they made eye contact with Daughtrey. The two then pulled their masks off and Williams removed his hand from the bag and threw the bag across his back. Williams and Cooper continued walking toward the bank entrance, paused at the entrance, and then walked down the street. Daughtrey telephoned the police and the two were arrested. A handgun, two bandanas, latex gloves, a knapsack, and a BB&T Bank brochure were found under the passenger seat. The defendants admit that they possessed the intent to commit the crime, but argued that they did not satisfy the *actus reus* of attempt.

Are the defendants guilty of an attempted bank robbery? See *Williams v. Commonwealth,* Va. App. LEXIS 154 (2004).

You can find the answer at www.sagepub.com/lippmanccl2e

Impossibility

Consider whether the following defendants should be held liable for an attempted offense.

- A pickpocket reaches into your pocket only to find that there is no wallet.
- An individual hands $100 to a seller in an effort to purchase narcotics and is arrested by the police before the seller is able to hand over what is later revealed to be baking powder.
- A doctor begins to perform an illegal abortion on a woman who is, in fact, a government undercover agent who is not pregnant.
- In an attempt to kill a romantic rival, an individual enters the rival's bedroom and shoots into the bed, not realizing that it is empty.
- A male forces himself on a sleeping female with the belief that she did not consent and then discovers that the victim died of a heart attack an hour prior.

In each instance, the defendant possessed an intent to commit a crime that was factually impossible to complete. The perpetrators would have successfully completed the offenses had the facts been as the individuals "believed them to be" (i.e., there is a wallet in the pocket, the seller possessed drugs, the woman was pregnant, the romantic rival is in his or her bed, and the potential victim is alive).

A **factual impossibility** is not a defense to an attempt to commit a crime. This is based on the fact that an offender who possesses a criminal intent and who takes steps to commit an offense should not be free from legal guilt. The factual circumstance that prevents an individual from actually completing the offense is referred to in some state statutes as an **extraneous factor**, or an event outside of an individual's control.

Factual impossibility should be distinguished from **legal impossibility**, which is recognized as a defense. Legal impossibility arises when an individual mistakenly believes that he or she is acting illegally. An example is taking a tax deduction that an individual believes is illegal but that, in fact, is perfectly permissible. A group of eighteen-year-old college freshmen will not be guilty of an attempt in the event that they go to a bar and order beers while mistakenly believing that the drinking age is twenty-one. As Professor Jerome Hall notes, it is not a crime to throw a Kansas steak into the garbage, and an individual who makes an effort to toss the steak into the garbage is not guilty of an attempted offense. The individual attempting to discard the steak possesses a criminal intent to violate a nonexistent law. Our old friend *the principle of legality* prohibits punishing an individual for a crime that is the product of his or her imagination.[13]

The rule is that a mistake concerning the facts is not a defense; a mistake concerning the law is a defense. Ask yourself whether the individual charged with an attempt was mistaken concerning the facts or mistaken concerning the law.

We also should refer to the defense of **inherent impossibility**. This occurs in those rare situations in which a defendant could not possibly achieve the desired result. An English case provides an example, in which an individual who stuck pins in a voodoo doll was acquitted of attempted murder.[14]

The Model Penal Code does not recognize the defense of factual impossibility under any circumstances. The code provides a "safety valve" in section 5.05(2) by providing that an act should be treated as a minor offense in those instances in which neither the offender nor his or her conduct presents a serious threat to the public.

Consider the voodoo doll example. Is there a social benefit in punishing an individual who possesses a criminal intent and who has committed a factually impossible act? Should there be a defense of legal impossibility? A Colorado statute provides that neither factual nor legal impossibility is a defense "if the offense would have [been] committed had the attendant circumstances been as the actor believed them to be. . . ."[15]

People v. Dlugash, decided by the New York Court of Appeals in 1977, is a well-known example of factual impossibility. A fight developed, and Bush shot Geller three times, killing Geller. Dlugash then approached the body and shot Geller five times in the head. The New York court determined that Dlugash believed at the time he fired his pistol that Geller was alive. As a prosecutor, would you charge Dlugash with attempted murder? Should we judge the dangerousness of Dlugash's acts by his intent or by the actual facts? What if Dlugash arrived following Bush's shooting of Geller and believed that Geller was lying wounded in bed and proceeded to shoot into the bed, only to discover that he shot a large toy bear? Would you charge Dlugash with attempted murder?[16]

The next case, *State v. Glass,* involves a sting operation conducted by an Idaho sheriff's department in an effort to investigate and arrest sex offenders. This directly raises the question of whether an individual should be held liable for an attempt to commit a crime involving a "nonexistent" victim.

Is Glass guilty of attempted lewd conduct with a minor under sixteen?

State v. Glass, *87 P.3D 302 (CT. APP. IDAHO 2003),* Opinion by: Lansing, J.

Jimmy Thomas Glass appeals from the judgment and sentence entered after a jury found him guilty of attempted lewd conduct with a minor under sixteen. Glass contends that . . . the evidence was insufficient to support a finding that he had taken a substantial step toward the completion of the crime. . . . We affirm.

Facts

The Ada County Sheriff's Office conducted an "online crimes" investigation targeting Internet chat rooms. As part of the investigation, Detective Bart Hamilton created a profile for a fictional fourteen-year-old female with the screen name "boredboisegirl14" (BBG14). On November 30, 2000, Detective Hamilton, using this profile, entered a chat room and waited for subjects to contact BBG14 via private instant messages. BBG14 soon received an instant message from Glass, who was using the screen name "s3x_slave_f0r_u." At the start of the online conversation, BBG14 informed Glass that she was fourteen years old. During their conversation, Glass described for BBG14, in graphic detail, the sexual acts that he would

like to perform with her. He also asked her about her past sexual experiences and offered to go to her house that day to be her "sex slave." BBG14 said that he could not go to her house because her mom was there, but she told Glass that she would see whether they could use her friend's house at a later date.

Glass contacted BBG14 again one week later. During this online chat, Glass asked BBG14 whether she had found a house that the two could use. BBG14 said that her friend's house would be available the week of December eighteenth. Glass responded that he "[couldn't] wait." On December fifteenth, Glass again contacted BBG14 about meeting during the week of December eighteenth. When BBG14 said that she could arrange an apartment for the next day, Glass agreed to meet then and said that he would bring a box full of condoms. BBG14 also wrote that she would place a picture of herself in a brown paper bag and leave it in a trash can in the parking lot of a local high school swimming pool for him to pick up. Glass said that he would retrieve it and would be driving a black Honda Civic. Then, before ending the conversation, the two agreed to meet at 10 A.M. the next day at the swimming pool, from which they would go to the apartment.

Immediately following this conversation, a police detective drove to the swimming pool and placed in the trash can a paper bag containing a photograph of an anonymous juvenile female. Shortly thereafter, as the detective watched from a distance, a black Honda Civic entered the parking lot of the swimming pool, and the driver retrieved the bag from the garbage can.

The next day, December sixteenth, at approximately 10:20 A.M., police detectives observed the same black Honda enter the parking lot of the swimming pool, turn around, and then go back out. Immediately after the car left the parking lot, the police initiated a stop. Glass, the driver of the car, was arrested. In a search of his automobile, the police officers found a box of condoms. During a subsequent police interview, Glass admitted to logging onto the chat room with the screen name of s3x_slave_f0r_u.

Glass was charged by indictment with attempted lewd conduct with a minor under sixteen. . . . He filed a motion to dismiss the charge, contending that (1) it was legally impossible to commit the crime of attempted lewd conduct with a minor, because there was no minor child involved, and (2) there was insufficient evidence to support the indictment, because his conduct did not constitute an attempt. The district court denied the motion.

At the conclusion of the trial, the jury found Glass guilty. The court imposed a unified sentence of five years with one year determinate, but suspended the sentence and placed Glass on probation for a period of seven years. Glass now appeals the . . . conviction. . . .

Issue

Glass first contends that the district court erred in rejecting his impossibility defense. He argues that it would have been impossible for him to commit the crime of lewd conduct with a minor, because there was no actual minor child involved, and as a result, it was also impossible for him to commit an attempt of that crime.

Reasoning

The same argument was recently rejected by this court. . . . We . . . held that impossibility is not a recognized defense to attempt crimes in the State of Idaho. In determining that Idaho's attempt statute . . . does not allow for an impossibility defense, we stated that the "statute provides no exception for those who intend to commit a crime but fail because they were unaware of some fact that would have prevented them from completing the intended crime."

Holding

Accordingly, we held that factual or legal impossibility for the defendant to commit the intended crime was not relevant to a determination of the defendant's guilt of attempt. It follows that the district court here correctly rejected Glass's proffered impossibility defense.

Issue

Glass next contends that the trial court erred in denying his motion for judgment of acquittal, because there was insufficient evidence to show that he had attempted to commit lewd and lascivious conduct. . . .

Reasoning

Glass argues that his act of driving to the swimming pool was, at most, mere preparation and fell short of a substantial step toward consummation of the crime. What conduct will constitute the requisite substantial step turns upon the facts and circumstances of each case. Of importance in this analysis is "the proximity of the act, both spatially and temporally, to the completion of the criminal design." . . . It has been said that for a criminal attempt to occur, there "must be a dangerous proximity to success." . . . It is our conclusion in the present case that Glass's acts were sufficient to show an act, beyond mere preparation, toward commission of the attempted crime. After having arranged with BBG14 to meet at a specific time and place for the expressed purpose of sexual activity, Glass arrived at that meeting place at approximately the appointed time with a box of condoms in his vehicle. This conduct goes beyond remote preparatory activity and unequivocally confirms a criminal design. He was unable to proceed further only because no fourteen-year-old girl appeared at the rendezvous point.

Glass contends that his driving through the parking lot without stopping was consistent with his position, presented at trial, that he went to the meeting place out of curiosity to see the girl rather than to pick her up. This defense theory does not explain, however, why Glass had taken care to have a supply of condoms at the ready

during this trip to the swimming pool. The evidence is more than adequate to support a jury finding that Glass drove away merely because there was no girl to stop for. The jury could reasonably find that Glass had not abandoned his effort to commit the crime but had simply been prevented from proceeding further because BBG14 was not there. . . .

Glass further asserts that the trial evidence is insufficient to support a finding that he had the intent necessary to support a guilty verdict. We conclude, to the contrary, that the record includes abundant evidence of his culpable intent. Glass initiated at least three online conversations with BBG14 in which he expressed his desire for a sexual relationship with her. He made arrangements to meet with her for a sexual encounter and arrived at the appointed time and place with a box of condoms in his car.

Holding

This evidence is sufficient to allow a jury to infer that Glass intended to commit lewd and lascivious conduct with a child under the age of sixteen. . . . Accordingly, the judgment of conviction and sentence are affirmed.

Questions for Discussion

1. What are the reasons for holding Glass criminally liable despite the fact that BBG14 was a fictional creation of the police? Should Glass be held liable for attempted lewd conduct with a child who does not exist? What is the social harm?
2. Did Glass go beyond mere preparation? Would you hold Glass guilty in the event that he only communicated with BBG14 over the Internet and never made an effort to meet her? What is the significance of the fact that Glass drove away from the swimming pool? See *Gladish v. United States,* F.3d (7th Cir. 2008).
3. Do you believe that it is appropriate for the police to use this type of investigative strategy?

Cases and Comments

Knowledge of the Facts. Ralph Damms was convicted of attempted murder and was sentenced to a term of imprisonment of not more than ten years. The verdict was affirmed by the Wisconsin Supreme Court. Marjory Damms had initiated a divorce action against Ralph and was also estranged from her mother, Mrs. Laura Grant. Ralph stopped Marjory on her way to work, claimed that Mrs. Grant was dying, and drove Marjory to her mother's home. Marjory then discovered that her mother was perfectly fine. Damms took advantage of this opportunity to attempt a reconciliation with his former wife. After two hours of unproductive conversation, Ralph offered to drive Marjory to work. During the drive, Ralph commented that it was possible for a person to die "quickly" and that "judgment day" may occur without warning. He then removed a cardboard box from under the seat and opened it and took a gun out of a paper bag. He aimed at Marjory and said that this is "to show you that I'm not kidding . . . [or] fooling."

Ralph announced that he was taking Marjory "up north" for a few days. Ralph wanted to eat and drove the car into a restaurant parking lot. Marjory told Ralph that she had a "couple of dollars," and when she refused to let Ralph inspect her checkbook, an argument ensued. Marjory opened the car door and started to run around the restaurant building, screaming for help. Ralph pursued her with a pistol in his hand. Two officers eating lunch rushed out of the restaurant. Marjory slipped and fell, and Ralph crouched down, held the pistol against her head, and pulled the trigger. Ralph exclaimed, "It won't fire. It won't fire." The officers arrested Ralph and discovered that the weapon was unloaded and that the clip containing the cartridges for the gun was in the cardboard box in the car. Damms later stated to two officers that he thought that the gun was loaded. However, Damms testified at trial that he knew that the pistol was not loaded.

The Wisconsin Supreme Court ruled that the jury could have reasonably concluded that Damms believed that the gun actually was loaded and that he therefore was legally liable for attempted murder. The court observed that an

> unequivocal act accompanied by intent should be sufficient to constitute a criminal attempt. . . . and he should not escape punishment . . . by reason of some fact unknown to him [that made it] impossible to effectuate the intended result.

The Supreme Court noted that Damms was excited when he grabbed the weapon and pursued his wife and may not have noticed the opening in the end of the butt caused by the absence of an ammunition clip, which would have clearly informed him that the gun was unloaded.

Judge Dietrich, in dissent, noted that Ralph had the gun in his hand several times and that "it would be impossible for him not to be aware or know that the pistol was unloaded. He could feel the hole in the bottom of the butt." Ralph, for example, certainly must have felt the hole in the bottom of the butt caused by the lack of an ammunition clip when he first removed the pistol from the box and then when he chased his wife with the pistol.

Why is the question whether Ralph knew the gun was unloaded significant? Do you agree with the Wisconsin Supreme Court? See *State v. Damms,* 100 N.W.2d 592 (Wis. 1960).

You Decide

7.3 Francisco Martin Duran was a twenty-six-year-old upholsterer from Colorado. On September 13, 1994, Duran bought an assault rifle and roughly 100 rounds of ammunition. Two days later, he purchased a thirty-round clip and equipped the rifle with a folding stock. Thirteen days later, Duran bought a shotgun and, the following day, additional ammunition. On September 30, 1993, Duran left work and, without contacting his family or employer, began a journey to Washington D.C. He purchased another thirty-round clip and a large coat in Virginia. On October tenth, Duran arrived in Washington D.C., and he stayed in various hotels over the next nineteen days.

On October 29, 1994, Duran positioned himself outside the White House fence and observed a group of men in dark suits, one of whom was Dennis Basso, who strongly resembled then-President Bill Clinton. Two eighth-grade students remarked that Basso looked like Bill Clinton. Duran almost immediately began firing twenty rounds at Basso, who managed to take cover. Duran was tackled by a pedestrian when attempting to reload a second clip. The Secret Service searched Duran's automobile and found incriminating evidence, including a map with the phrase "kill the Pres!" and an "X" drawn across a photo of President Clinton. A subsequent search of Duran's home led to the seizure of other incriminating evidence, including a business card on the back of which Duran called for the killing of all government officers and department heads.

Was Duran guilty of an attempt to kill the president of the United States despite the fact that this was impossible given that President Clinton was not on the lawn of the White House? See *United States v. Duran,* 96 F.3d 1495 (D.C. Cir. 1996).

You can find the answer at www.sagepub.com/lippmanccl2e

Abandonment

An individual who abandons an attempt to commit a crime based on the intervention of outside or extraneous factors remains criminally liable. On the other hand, what about an individual who voluntarily abandons his or her criminal scheme after completing an attempt?

In *People v. Staples,* Staples intentionally rented an office above a bank. He learned that no one was in the building on Saturday and received permission from the owner to move items into his office over the weekend. Staples took advantage of the fact that no one was in the building and drilled several holes partway through the floor, which he then covered with a rug. He placed the drilling tools in the closet and left the key in the office. Later, the landlord discovered the holes and notified the police. Staples was arrested and confessed, explaining that he abandoned his criminal plan after realizing that he could not enjoy life while living off stolen money.

Is the defendant guilty of an attempt? Assuming that the defendant committed an attempted burglary (breaking and entering with an intent to steal), does the defendant's change of heart or abandonment constitute a defense? Would it make a difference if the defendant changed his mind only after hearing voices in the bank?[17]

The Model Penal Code, in section 5.01(4), recognizes the affirmative defense of **abandonment** in those instances in which an individual commits an attempt and "abandoned his effort . . . under circumstances manifesting a complete and voluntary manifestation of criminal purpose." The important point is that an individual can commit an attempt and then relieve himself or herself from liability by voluntarily abandoning the criminal enterprise. A renunciation is not voluntary when motivated by a desire to avoid apprehension, provoked by the realization that the crime is too difficult to accomplish, or where the offender decides to postpone the crime or to focus on another victim. For example, abandonment has not been recognized as a defense where the lock on a bank vault or the door on a cash register proved difficult to open, the police arrived during the commission of a crime, or a victim broke free and fled. Once having completed the commission of a crime, the fact that an offender is full of regret and rushes the victim to

the hospital also does not free the assailant from criminal liability. Abandonment, in short, is a defense to attempt when an individual freely and voluntarily undergoes a change of heart and abandons the criminal activity.[18]

In some cases, courts have continued to hold that once an attempt is complete, an individual cannot avoid criminal liability. Why should an attempt be treated differently than any other crime? The vast majority of decisions recognize that there are good reasons for recognizing the defense of abandonment, even in cases where the individual's acts are "dangerously close" to the completion of a crime.[19]

- *Lack of Purpose.* An individual who abandons a criminal enterprise lacks a firm commitment to complete the crime and should be permitted to avoid punishment.
- *Incentive to Renounce Crime.* The defense of abandonment provides an incentive for individuals to renounce their criminal conduct before completing the crime.

In reading the next case, *Ross v. State,* ask yourself whether the defendant was guilty of an attempted rape and whether he voluntarily or involuntarily abandoned his criminal activity. Does reading this case persuade you that the affirmative defense of abandonment is a good or a bad idea?

The Statutory Standard

Compare the rule on abandonment with the Arizona statute that requires notification to the police.

13-1005. Renunciation of Attempt. . . .

(1) In a prosecution for attempt . . . it is a defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the attempt. . . .

(2) A renunciation is not voluntary and complete . . . if it is motivated in whole or in part by:

(a) A belief that circumstances exist which increase the probability of immediate detection or apprehension of the accused or another participant in the criminal enterprise or which render more difficult the accomplishment of the criminal purpose; or

(b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim, place or another but similar objective.

(3) A warning to law enforcement authorities is not timely . . . unless the authorities, reasonably acting upon the warning, would have the opportunity to prevent the conduct or result. An effort is not reasonable within the meaning of this section unless the defendant makes a substantial effort to prevent the conduct or result.

Did Ross voluntarily abandon his attempt to rape the victim?

Ross v. State, *601 So. 2d 872 (Miss. 1992),* Opinion by: Prather, J.

This attempted-rape case arose on the appeal of Sammy Joe Ross from the ten-year sentence imposed on July 7, 1988, by the Circuit Court of Union County. . . .

Facts

Dorothy Henley and her seven-year-old daughter lived in a trailer on a gravel road. Henley was alone at home and answered a knock at the door to find Sammy Joe Ross asking directions. Henley had never seen Ross before. She stepped out of the house and pointed out the house of a neighbor who might be able help him. When she turned back around, Ross pointed a handgun at her. He ordered her into the house, told her to undress, and shoved her onto the couch. Three or four times Ross ordered Henley to undress and once threatened to kill her. Henley described

herself as frightened and crying. She attempted to escape from Ross and told him that her daughter would be home from school at any time. She testified that,

> I started crying and talking about my daughter, that I was all she had because her daddy was dead, and he said if I had a little girl he wouldn't do anything, for me just to go outside and turn my back.

As instructed by Ross, Henley walked outside behind her trailer. Ross followed and told her to keep her back to the road until he had departed. She complied.

Henley was able to observe Ross in her sunlit trailer with the door open for at least five minutes. She stated that she had an opportunity to look at him and remember his physical appearance and clothing. Henley also described Ross's pickup truck, including its color, make, and the equipment—that is, a toolbox.

On December 21, 1987, a Union County grand jury indicted Sammy Joe Ross for the attempted rape of Henley, charging that Ross "did unlawfully and feloniously attempt to rape and forcibly ravish" the complaining witness, an adult female. . . . On June 23, 1988, the jury found Ross guilty. On July seventh, the court sentenced Ross to a ten-year term. . . . Ross timely filed a notice of appeal.

Issue

The primary issue here is whether sufficient evidence presents a question of fact as to whether Ross abandoned his attack as a result of outside intervention. Ross claims that the case should have gone to the jury only on a simple assault determination. Ross asserts that "it was not . . . Henley's resistance that prevented her rape nor any independent intervening cause or third person, but the voluntary and independent decision by her assailant to abandon his attack." The State, on the other hand, claims that Ross "panicked" and "drove away hastily."

Reasoning

Henley told Ross that her daughter would soon be home from school. She also testified that Ross stated if Henley had a little girl, he wouldn't do anything to her and to go outside [the house] and turn her back [to him].

The trial court instructed the jury that if it found that Ross did "any overt act with the intent to have unlawful sexual relations with [the complainant] without her consent and against her will," then the jury should find Ross guilty of attempted rape. The court further instructed the jury that before you can return a verdict against the defendant for attempted rape, that you must be convinced from the evidence and beyond a reasonable doubt "that the defendant was prevented from completing the act of rape or failed to complete the act of rape by intervening, extraneous causes. If you find that the act of rape was not completed due to a voluntary stopping short of the act, then you must find the defendant not guilty."

This court has held that lewd (indecent) suggestions coupled with physical force constituted sufficient evidence to establish intent to rape. . . . Attempt consists of "1) an intent to commit a particular crime; 2) a direct ineffectual act done toward its commission, and 3) failure to consummate its commission." The Mississippi attempt statute requires that the third element, failure to consummate, result from extraneous causes. . . . Where the assailant released his throat-hold on the unresisting victim and told her she could go, after which a third party happened on the scene, this court has held that the jury could not have reasonably ruled out abandonment. In comparison, this court has held that where the appellant's rape attempt failed because of the victim's resistance and ability to sound the alarm, the appellant cannot establish an abandonment defense. In another case, the defendant did not voluntarily abandon his attempt but instead fled after the victim, a hospital patient, pressed the nurse's buzzer; a nurse responded and the victim spoke the word "help." The court concluded, "The appellant ceased his actions only after the victim managed to press the buzzer alerting the nurse." . . . In another case, the court properly sent the issue of attempt to the jury where the attacker failed because the victim resisted and freed herself.

Thus, abandonment occurs where, with no physical resistance or external intervention, the perpetrator changes his mind. At the other end of the scale, a perpetrator cannot claim that he abandoned his attempt when, in fact, he ceased his efforts because the victim or a third party intervened or prevented him from furthering the attempt. Somewhere in the middle lies a case . . . where the victim successfully sounded an alarm, presenting no immediate physical obstacle to the perpetrator's continuing the attack, but sufficiently intervening to cause the perpetrator to cease his attack.

The key inquiry is a subjective one: What made Ross leave? According to the undisputed evidence, he left because he responded sympathetically to the victim's statement that she had a little girl. He did not fail in his attack. No one prevented him from completing it. Henley did not sound an alarm. She successfully persuaded Ross, of his own free will, to abandon his attempt. No evidence shows that Ross panicked and hastily drove away, but rather, the record shows that he walked the complainant out to the back of her trailer before he left. Thus . . . this is not to say that Ross committed no criminal act, but "our only inquiry is whether there was sufficient evidence to support a jury finding that [Ross] did not abandon his attempt to rape."

Holding

Ross raises a legitimate issue of error in the sufficiency of the evidence supporting his conviction for attempted rape because he voluntarily abandoned the attempt. This court reverses. . . .

Questions for Discussion

1. What is the subjective legal test for abandonment?
2. The Mississippi Supreme Court rules that Ross voluntarily abandoned the attempted rape. How do you explain this ruling in light of the fact that Ross likely would have raped Henley (not her real name) had she not informed him that her daughter would be returning home? Was this information an extraneous factor?
3. Can you distinguish this rule from the holding of the ruling of the Wisconsin Supreme Court in *Le Barron v. State,* 145 N.W.2d 79 (Wis. 1966)? In *Le Barron,* the Wisconsin court ruled that the defendant did not voluntarily abandon an attempted rape when he failed to complete the rape after determining that the victim was telling the truth in claiming that she was pregnant.
4. How would you rule in *Ross v. State?*

See more cases on the study site: Le Barron v. State, *www.sagepub.com/lippmanccl2e*

You Decide

7.4 Rodney Herron was stopped by the police for driving under the influence of alcohol at 2:19 A.M. He was processed at the police station and dropped off at home at 4:00 A.M. He walked into the dimly lighted living room and noticed an individual lying on the couch whom he believed to be his wife, who had been regularly sleeping on the sofa. The individual was facing the back of the couch, and her face was partially covered with a sheet. Herron unzipped his pants, but left them on, and lay down behind the person on the couch. He unbuttoned the individual's pants and slightly pulled them down. He placed the other person's hand on his penis, touched the person's backside and may have kissed her. Herron heard the other person "whimpering" and realized that the individual on the couch was his stepdaughter rather than his wife. He was charged with attempted sexual battery, an uninvited sexual molestation of his stepdaughter. Is Herron guilty of an attempted sexual battery? Did he abandon his attempt? See *State v. Herron,* 1996 WL 715445 (Ohio App.).

You can find the answer at www.sagepub.com/lippmanccl2e

Conspiracy

For a deeper look at this topic, visit the study site.

The crime of **conspiracy** comprises an agreement between two or more persons to commit a criminal act. There are several reasons for punishing an agreement:

- *Intervention.* Protecting society by arresting individuals before they commit a dangerous crime.
- *Group Activity.* Crimes committed by groups have a greater potential to cause social harm.
- *Deterrence.* Group pressure makes it unlikely that the conspirators will be deterred from carrying out the agreement.

The common law crime of conspiracy was complete with the agreement to commit a crime. Most modern statutes require an affirmative act, however slight, toward carrying out the conspiracy. The important point is that the law of conspiracy permits law enforcement to arrest individuals at an early stage of criminal planning.

Bear in mind that in common law, the conspiracy did not merge into the criminal act. Today, this continues to be the rule; conspiracy does not merge into the attempted or completed offense that is the object of conspiracy. *As a result, an individual may be convicted of both the substantive offense that is the object of the conspiracy and of a conspiracy. A defendant may be held liable for both armed robbery and for a conspiracy to commit armed robbery.* Remember that under the Pinkerton rule, an individual is guilty of all criminal acts committed by one of the conspirators in furtherance of the conspiracy, regardless of whether the individual aided or abetted or was even aware of the offense.

State statutes differ on the punishment of a conspiracy. Some provide that a conspiracy is a misdemeanor, others that the sentence for conspiracy is the same as the target offense, and a third group provides a different sentence for conspiracies to commit a misdemeanor and for conspiracies to commit a felony. *In general, a conspiracy to commit a felony is a felony; a conspiracy to commit a misdemeanor is a misdemeanor.*[20]

The law of conspiracy is one of the most difficult areas of the criminal law to understand. As former Supreme Court Justice Robert Jackson observed, "The modern crime of conspiracy is so vague that it almost defies definition."[21]

Actus Reus

The *actus reus* of conspiracy consists of

- entering into an agreement to commit a crime, and,
- under some modern statues, an overt act in furtherance of the agreement is required.

The core of a conspiracy charge is an agreement. Individuals do not normally enter into a formal contractual agreement to commit a crime. Prosecutors typically are forced to point to circumstances that strongly indicate that the defendants agreed to commit a crime. In *Commonwealth v. Azim,* Charles Azim pulled his automobile over to the curb, and one of the passengers, Thomas Robinson, called to a nearby Temple University student. The student refused to respond, and Robinson and Mylice James exited the auto, beat and choked him, and took his wallet. The three then drove away from the area. The Pennsylvania Superior Court, in affirming Azim's conviction for conspiracy, pointed to Azim's association with the two assailants, his presence at the crime scene, and Azim's waiting in the automobile with the engine running and lights on as the student was beaten. The case for conspiracy would have been even stronger had this been part of a pattern of criminal activity or if there was evidence that the three divided the money.[22]

United States v. Brown is often cited to illustrate the danger that courts will find a conspiracy based on even the slightest evidence suggesting that the defendants cooperated with one another. An undercover officer approached Valentine on the street seeking to purchase marijuana. Brown joined the conversation and advised Valentine three times that the officer "looks okay to me." Brown told Valentine that there was no reason to distrust the customer or to take precautions and persuaded Valentine to personally hand the drugs over to the undercover agent. The federal court of appeals concluded that the facts indicated that Brown had agreed with Valentine to direct or advise Valentine on drug sales. Judge Oakes observed in dissent that there was not a "shred of evidence" that Brown was involved with Valentine and that when "numerous other inferences could be drawn from the few words of conversation . . . I cannot believe that there is proof of conspiracy . . . beyond a reasonable doubt." Judge Oakes asked, "What conspiracies might we approve tomorrow? The majority opinion will come back to haunt us, I fear."[23]

Critics like to point to a series of trials of anti–Vietnam War activists conducted during the 1960s to demonstrate the potential abuse of conspiracy charges. In the "Chicago Eight" trial, eight activists, most of whom did not even know one another, were prosecuted for conspiring to cross state lines to incite a riot at the 1968 Chicago Democratic Convention; they were ultimately freed.[24]

Overt Act

Under the common law, an agreement was sufficient to satisfy the elements of a conspiracy. Most states and the federal statute now require proof of an **overt act** in furtherance of the conspiracy. The overt act requirement is satisfied by even an insignificant act that is far removed from the commission of a crime. As observed by Justice Oliver Wendell Holmes, "The essence of the conspiracy is being combined for an unlawful purpose—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it. . . ."[25] Attending a meeting of the Communist Party was considered to constitute an overt act in furtherance of a Communist conspiracy to overthrow the United States government,[26] and purchasing large quantities of dynamite satisfied the overt act requirement for a conspiracy to blow up a school building.[27] In other cases, the overt act has been satisfied by observing the movements of an intended kidnapping victim or by purchasing stamps to send poison through the mail.[28]

An overt act by any party to a conspiracy is attributed to every member and provides a sufficient basis for prosecuting all the participants. The requirement of an overt act is intended to limit conspiracy prosecutions to agreements that have progressed beyond the stage of discussion and that therefore present a social danger.[29]

Mens Rea

The *mens rea* of conspiracy is the intent to achieve the object of the agreement. Some judges continue to express uncertainty over whether this requires a purpose to cause the result or whether it is sufficient that an individual knows that a result will occur. Under the knowledge standard, all that is required is that the seller be aware of a buyer's "intended illegal use." A purpose standard requires that the seller possess an intent to further, promote, and cooperate in the buyer's specific illegal objective.

A knowledge standard may deter individuals from providing assistance to individuals whom they are aware or suspect are engaged in illegal activity. On the other hand, limiting liability to individuals with a criminal purpose targets individuals who intend to further criminal conduct.

The Model Penal Code reflects the predominant view that a specific intent to further the object of the conspiracy is required. In *United States v. Falcone,* the U.S. Supreme Court ruled that individuals who provided large quantities of sugar, yeast, and cans to individuals whom they knew were engaged in illegally manufacturing alcohol were not liable for conspiracy. The court held that the government was required to demonstrate that the suppliers intended to promote the illegal enterprise.[30]

In *People v. Lauria,* a California appellate court was confronted with the challenge of determining whether the operator of a telephone message service was merely providing a service to his clients knowing that they were prostitutes or whether he conspired to further acts of prostitution. The court rejected the prosecution's claim that Lauria's knowledge that three of the customers were prostitutes satisfied the mental element required to hold Lauria liable for conspiring to commit prostitution. The court ruled that the prosecution must demonstrate that Lauria possessed an intent to further a criminal enterprise and that there was insufficient evidence that "Lauria took any direct action to further, encourage or direct . . . call-girl activities."

The California court provided some direction to prosecutors in future cases by observing that Lauria's intent to further prostitution might be established by evidence that he promoted and encouraged the prostitutes' pursuit of customers or received substantial financial benefits from their activities. It was significant that only a small portion of Lauria's business was derived from the prostitutes and that he received the same fee regardless of the number of messages left for his prostitute customers.[31]

Parties

A conviction for conspiracy requires that two or more persons intentionally enter into an agreement with the intent to achieve the crime that is the objective of the conspiracy. This is referred to as the **plurality requirement**. As noted by former Supreme Court Justice Benjamin Cardozo, "It is impossible . . . for a man to conspire with himself."[32]

This joint or **bilateral** conception of conspiracy means that a charge of conspiracy against one conspirator will fail in the event that the other party to the conspiracy lacked the required *mens rea*. A conspirator in a two-person conspiracy, for example, would be automatically acquitted in the event that the other party was an undercover police officer or was legally insane and was legally incapable of entering into an agreement. In a joint trial of two conspirators at common law, the acquittal of one alleged conspirator resulted in the dismissal of the charges against the other conspirator. Keep in mind that under the bilateral approach, "There must be at least two guilty conspirators or none."[33]

The bilateral approach is criticized for undermining the enforcement of conspiracy laws. An individual who intends to enter into a conspiracy to commit a crime is a threat to society, and he or she should be subject to punishment regardless of whether the other party turns out to be an undercover police informant who lacks a criminal intent. On the other hand, the bilateral approach is consistent with the view that the law of conspiracy should be directed against group crime.[34]

The Model Penal Code adopts a **unilateral** approach that examines whether a single individual agreed to enter into a conspiracy rather than focusing on whether two or more persons entered into an agreement. This scheme has been incorporated into a number of modern state statutes. Under the unilateral approach, the fact that one party is an undercover police officer or lacks the capacity to enter into a conspiracy does not result in the acquittal of the other conspirator. The commentary to the Model Penal Code notes that under the unilateral approach, it is "immaterial to the guilt of a conspirator . . . that the person or all of the persons with whom he conspired have not been or cannot be convicted."[35]

The unilateral approach has been criticized for permitting the prosecution of individuals for a conspiracy who, in fact, have not actually entered into a criminal agreement. The fear is expressed by civil libertarians that the unilateral approach enables undercover agents to manufacture crime by enticing individuals into unilateral conspiratorial agreements.[36]

The Structure of Conspiracies

The structure of a conspiracy is important. Defendants may be found guilty only of the conspiracy charged at trial and may offer the defense that there were separate agreements to commit different crimes rather than a single conspiracy. A defendant might admit that he or she was involved in a conspiracy to kidnap and hold a corporate executive for ransom and also argue that the other kidnappers entered into a separate conspiracy to kill the executive. Remember, in the event of a single conspiracy, our kidnapper would be held liable for all offenses committed in furtherance of the agreement to kidnap the executive, including the murder.[37]

Most complex conspiracies can be categorized as either a **chain conspiracy** or **wheel conspiracy**.

A chain conspiracy typically arises in the distribution of narcotics and other contraband. This involves communication and cooperation by individuals linked together in a vertical chain to achieve a criminal objective.

The classic case is *United States v. Bruno,* in which eighty-eight defendants were indicted for a conspiracy to import, sell, and possess narcotics. This involved smugglers who brought narcotics into New York and sold them to middlemen who distributed the narcotics to retailers who, in turn, sold narcotics to operatives in Texas and Louisiana for distribution to addicts. The petitioners appealed on the grounds that there were three conspiracies rather than one large conspiracy. The court ruled that this was a single chain conspiracy in which the smugglers knew that the middlemen must sell to retailers for distribution to addicts, and the retailers knew that the middlemen must purchase drugs from smugglers. In the words of the court, the "conspirators at one end of the chain knew that the unlawful business would not and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers." Each member of the conspiracy knew "that the success of that part with which he was immediately concerned, was dependent upon the success of the whole." Remember that this means that every member of the conspiracy was liable for every illegal transaction carried out by his co-conspirators in Texas and in Louisiana.[38]

A circle or wheel conspiracy involves a single person or group that serves as a *hub,* or common core, connecting various independent individuals or spokes. The *spokes* typically interact with the hub rather than with one another. In the event that the spokes share a common purpose to succeed, there is a single conspiracy. On the other hand, in those instances that each spoke is unconcerned with the success of the other spokes, there are multiple conspiracies.

The most frequently cited case illustrating a wheel conspiracy is *Kotteakos v. United States*. Simon Brown, the hub, assisted thirty-one independent individuals to obtain separate fraudulent loans from the government. The Supreme Court held that although all the defendants were engaged in the same type of illegal activity, there was no common purpose or overall plan, and the defendants were not liable for involvement in a single conspiracy. Each loan "was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through." As a result, the Supreme Court found that there were thirty-two separate conspiracies involving Brown rather than one common conspiracy.[39]

State v. McLaughlin is an example of a wheel conspiracy in which the individuals involved share a common purpose. In *McLaughlin,* several gamblers independently agreed to subscribe to an illegal horse racing service that provided racing results and information. The customers realized that the success of this financially expensive venture depended on the willingness of each of the other gamblers to support the service, and the defendants were held liable for involvement in a single, common wheel conspiracy.[40]

Criminal Objectives

The crime of conspiracy traditionally punished agreements to commit a broad range of objectives, many of which would not be criminal if committed by a single individual. The thinking was that these acts assume an added danger when engaged in by a group of individuals.

In 1832, English jurist Lord Denman pronounced that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means."[41] English and American courts interpret "unlawful" to include acts that are not punishable under the criminal law. It was "enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offense consist."[42]

The U.S. Supreme Court has recognized the danger that broadly defined conspiracy statutes may fail to inform citizens of the acts that are prohibited and may provide the police, prosecutors, and judges with broad discretion in bringing charges. The doctrine of conspiracy, for instance, was used against workers who went on strike in protest against a fellow employee who agreed to work below union wages.[43] The English House of Lords upheld the conviction of an individual for "conspiracy to corrupt public morals" who agreed to publish a directory of prostitutes.[44] In ruling that a Utah conspiracy statute that punished conspiracies to commit acts injurious to the public morals was unconstitutional, the U.S. Supreme Court noted that the statute

> would seem to be a warrant for conviction for an agreement to do almost any act which a judge and jury might find . . . contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order.[45]

Modern statutes generally limit the criminal objectives of conspiracy to agreements to commit crimes. Several jurisdictions, however, continue to enforce broadly drafted statutes. California Penal Code section 182-185(5) punishes a conspiracy to commit "any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of justice." Would a religious group's vocal opposition to "safe sex" through the use of condoms potentially result in criminal liability under this statute? The U.S. government's conspiracy statute broadly punishes persons conspiring either to "commit any offense against the United States, or to defraud the United States." A conspiracy to commit a felony under this statute is punishable by up to five years in prison in addition to a fine, while a conspiracy to commit a misdemeanor is subject to the maximum penalty for the target offense.[46]

Pinkerton v. United States established that all criminal acts undertaken in furtherance of a conspiracy or that are "reasonably foreseeable as the necessary or natural consequences of the conspiracy" are attributable to each member by virtue of his or her membership. In *Pinkerton,* Daniel Pinkerton was held liable for conspiring with his brother Walter to avoid federal taxes. Daniel was held criminally responsible for Walter's failure to pay taxes, despite the fact that Daniel was in prison at the time that Walter submitted his fraudulent tax return. The Model Penal Code rejects the *Pinkerton* rule, because each conspirator may be held liable for "thousands of crimes" of which he or she was "completely unaware" and did not "influence at all." Consider the often-cited example of a woman who refers individuals to a criminal abortionist who may find herself being held liable for unlawful abortions performed on women referred to the abortionist by a co-conspirator whom she has never met.[47]

You also should be aware of **Wharton's rule**. This provides that an agreement by two persons to commit a crime that requires the voluntary and cooperative action of two persons cannot constitute a conspiracy. The classic examples of consensual crimes that require the participation of two individuals and do not permit a charge of conspiracy under Wharton's rule are adultery, bigamy, the sale of contraband, bribery, and dueling. These offenses already punish a cooperative agreement between two individuals to commit a crime, and there is no reason to further punish individuals for entering into a conspiratorial agreement. Wharton's rule does not prevent a conspiracy involving more than the required number of individuals. Three individuals, for example, may conspire for two of them to engage in bribery. Two individuals may also conspire for other individuals to pay and receive bribes.[48]

Another principle is the ***Gebardi* rule**. This provides that an individual who is in a class of persons that are excluded from criminal liability under a statute may not be charged with a conspiracy to violate the same law. In *Gebardi v. United States,* the U.S. Supreme Court reversed the conspiracy conviction of a man and woman for violation of the Mann Act. This statute prohibited and punished the transportation of a woman from one state to another for immoral purposes. The Court reasoned that the statute was intended to protect women from sexual exploitation and was defined so as to solely punish the individual transporting the women. The Court therefore reasoned that the two defendants could not enter into a criminal conspiracy and reversed their conviction.[49]

Conspiracy Prosecutions

Judge Learned Hand called conspiracy the "darling of the modern prosecutor's nursery."[50] Judge Hand was referring to the fact that conspiracy constitutes a powerful and potential tool for prosecuting and punishing defendants.[51]

- Conspiracies are not typically based on explicit agreements and may be established by demonstrating a commitment to a common goal by individuals sharing a criminal objective.
- Defendants may be prosecuted for both conspiracy and the commission of the crime that was the object of the conspiracy.
- A prosecution may be brought in any jurisdiction in which the defendants entered into a conspiratorial agreement or committed an overt act.
- The defendants all may be joined in a single trial, creating the potential for "guilt by association."
- All conspirators are held responsible for the criminal acts and statements of any co-conspirator in furtherance of the conspiracy. An individual may be held liable who is not present or even aware of a co-conspirator's actions.
- Individuals may abandon the conspiracy and escape liability for future offenses only if this abandonment is communicated to the other conspirators. Some statutes require that individuals persuade the other conspirators to abandon the conspiracy.

The federal law of conspiracy was further expanded in 1970 when Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO). This law is intended to provide prosecutors with a powerful and potent weapon against organized crime. The RICO law essentially eliminates the need to prove that individuals are part of a single conspiracy, and, instead, holds defendants responsible for all acts of racketeering undertaken as part of an "enterprise." Racketeering includes a range of state and federal offenses typically committed by organized crime including murder, kidnapping, gambling, arson, robbery, bribery, extortion, and dealing in narcotics or obscene material. Critics have voiced concern over the government's power to bring a counterfeiter to trial for murders committed by individuals involved in an unrelated component of a criminal enterprise.

The next case in the text, *United States v. Handlin,* asks you to determine whether the defendants are guilty of all crimes undertaken pursuant to a single conspiracy or whether there were a series of separate conspiracies.

The Statutory Standard

The Iowa conspiracy statute is fairly representative of state statutes.

Iowa Code Section 706.1. Conspiracy

> A person commits conspiracy with another if, with the intent to promote or facilitate the commission of a crime which is an aggravated misdemeanor or felony, the person does either of the following:
>
> > Agrees with another that they or one or more of them will engage in conduct constituting the crime of an attempt or solicitation to commit the crime.
> >
> > Agrees to aid another in the planning or commission of the crime or of an attempt or solicitation to commit the crime.
>
> It is not necessary for the conspirator to know the identity of each and every conspirator.
>
> A person shall not be convicted of conspiracy unless it is alleged and proven that at least one conspirator committed an overt act evidencing a design to accomplish the purpose of the conspiracy by criminal means.
>
> A person shall not be convicted of conspiracy if the only other person or persons involved in the conspiracy were acting at the behest of or as agents of a law enforcement agency in an investigation of the criminal activity alleged at the time of the formation of the conspiracy.

The Illinois conspiracy statute has an interesting provision regarding co-conspirators that reflects the unilateral approach to criminal agreements:

Illinois Laws Section 720 5/8-2. Solicitation, Conspiracy, and Attempt

(1) . . .

(2) Co-conspirators.

It shall not be a defense to conspiracy that the person or person with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or

(2) Has been convicted of a different offense, or

(3) Is not amenable to justice, or

(4) Has been acquitted, or

(5) Lacked the capacity to commit an offense. . . .

Model Penal Code

Section 5.03. Criminal Conspiracy

(1) . . . A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. . . .

(2) . . . If a person guilty of conspiracy . . . knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

(3) . . . If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) . . .

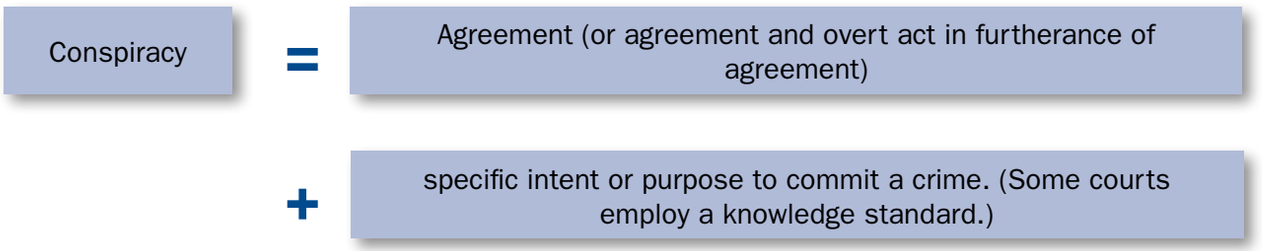
(a) . . . two or more persons charged with criminal conspiracy may be prosecuted jointly. . . .

Analysis

1. The Model Penal Code limits conspiracies to crimes and does not extend conspiracy to broad categories of immoral or corrupt behavior.
2. A defendant must possess the purpose of promoting or facilitating the commission of a crime. Knowledge does not satisfy the intent requirement of conspiracy (§5.04(1)).
3. The essence of a conspiracy is an agreement. This determination should be based on clear evidence (§5.04(1)(a)).
4. A unilateral approach to conspiratorial agreements is adopted (§5.04(1)(b)).
5. The Model Penal Code does not use the terminology of wheel or chain conspiracies. The code, instead, examines whether a specific individual has entered into a conspiratorial agreement and whether the individual is aware that the person with whom he or she has conspired has entered into agreements with other individuals. The end result would not differ from the wheel or chain analysis (§5.04(2)).

6. An overt act is required other than in the case of serious felonies.
7. The Pinkerton rule is rejected (§2.06); individuals are responsible only for crimes that they solicited, aided, agreed to aid, or attempted to aid.
8. Conspiracy is punished to the same extent as the most serious offense that is attempted or solicited or is an object of the conspiracy (§5.05(1)).
9. The code does not permit conviction of both a conspiracy and the substantive crime that is the object of the conspiracy (§1.07)(1)(b).
10. The *Gebardi* rule is incorporated into the Model Penal Code (§5.04(2)).

The Legal Equation



Was there a single conspiracy or were there multiple conspiracies to commit arson?

UNITED STATES v. HANDLIN, *366 F.3D 584 (7TH CIR. 2004), OPINION BY: BAUER, J.*

Facts

Illiopolis, Illinois, a small town with a population of 916, was the site of a combustible criminal conspiracy that raged for a period of years. Between the years of 1991 and 1997, the area in and around this small town saw eight successful acts of arson and one failed attempt. It is a wonder that there was anything left standing in the area when the ashes finally settled. The story is as follows:

Late in 1990 or January of 1991, defendant James F. Handlin and Jack Skaggs purchased . . . what would be called J&J's Company Store from Lawrence "Joe" Hamm. Shortly after gaining possession of the store, Handlin and Skaggs increased the insurance coverage on their new store.

Around this same time, Hamm purchased another convenience store/gas station and began operating it under the name Joe's Company Store. The opening of Joe's Company Store was bad news to its competition, Johnson's Red Fox Grocery, which was located across the street from Joe's. Johnson's Red Fox Grocery erupted in flames on February 1 or 2, 1991. The fire was started by John W. "Billy" Rogers when he poured a quantity of gasoline down a roof vent. The gasoline was then followed by a lit road flare. Johnson's Red Fox was leveled by the fire, and the insurance company paid the owners approximately $800,000. Rogers received $2,500 from Hamm for the arson job.

On February 16, 1991, after the insurance coverage had been increased, J&J's was destroyed by fire. While separate investigations by the state fire marshal's office and the insurance company were unable to determine the cause of the fire, Rogers's testimony at the trial, which would commence much later, showed that Rogers and Danny Dennison were paid $500 to burn the store. The insurance company paid out a total of $51,000. Of these funds, Hamm received $42,000 . . . Handlin's attorney received $2,500, and the balance was used for "clean up."

After putting his direct competitor out of business, on August 15, 1991, Hamm hired Rogers to burn down . . . Joe's Company Store. Unfortunately for Hamm and Rogers, the fire did not completely destroy the building. It turned out that the flare used to ignite the blaze caused a water pipe to rupture, and the escaping water extinguished the flames. Hamm made an insurance claim of $42,936 but was only paid $28,529. Because the building was not totally destroyed, Hamm refused to pay Rogers for his work. . . .

Business must have been good for a while, because there was not another fire for approximately three years, but on June 5, 1994, Rogers was paid $500–$600 by Hamm to burn down Granny's Pub and Grub, another competitor of Joe's Company Store. Although Rogers failed to level Granny's Pub and Grub, he did succeed in causing extensive fire damage to the interior of the building. Granny's insurance company paid out approximately $37,000. There was then another break in the setting of fires.

In 1996, Hamm and Handlin approached Rogers with a plan to prevent Green Oil Gas Station from competing with Joe's Company Store. Located across the street from Joe's Company Store, Green Oil had been newly remodeled with fiberglass-lined gas tanks, a new canopy, concrete, lighting, and a convenience store. Hamm and Handlin's plan was to provide Rogers with a cordless drill, a drill bit, and two steel rods to extend the drill bit so that he could puncture the underground gas tanks. Rogers completed the plan and was paid $500 for his work after Handlin told Hamm of their success. Their success, however, was short lived. The owner of the Green Oil Gas Station repaired the tanks and stayed in business.

Having failed to eliminate his competition by more subtle means, Hamm reverted to the tried-and-true method of arson. Rogers was paid $1,000 to burn down Green Oil, and he did so in the fall of 1996. The loss was valued at nearly $175,000.

Later, in October 1996, Handlin approached two of his employees, Chad Bennett and James Clapp, and asked if they would be interested in setting fire to Habits and Vices Tavern. This bar was located about one block from Joe's Company Store. They did not give an answer immediately, and when they did agree, Handlin told them it was too late. Rogers had beaten them to the punch. At the same time that Handlin solicited Bennett and Clapp to perform the arson, Hamm talked to Rogers. Rogers agreed to set fire to Habits and Vices Tavern for $1,000, and on October 1, 1996, he did so. Habits and Vices Tavern's insurer paid out $160,000 as a result of the fire.

The conspirators then hatched yet another scheme to defraud their own insurance companies. In the fall of 1996, Handlin and Hamm approached Rogers with a plan to stage a vehicular accident. Rogers was to steal a rental truck from a Decatur business and ram Handlin's and Hamm's unoccupied and parked vans. Rogers refused to participate; apparently, the prospect of stealing a U-Haul during the daylight hours was too much risk for Rogers. Undaunted, Handlin went to the second-stringers, Clapp and Bennett, and discussed the same scheme. Clapp and Bennett agreed to participate.

In the evening hours of December 6, 1996, Clapp and Bennett stole a U-Haul rental truck from a Decatur business and drove it to a country road near Illiopolis. The plan was simple in its execution. Handlin's van was parked just short of a stop sign, and Hamm's van was parked directly behind Handlin's. When Handlin gave the signal, Bennett accelerated to 55 mph and rammed the rear end of Hamm's van. Handlin and Hamm called 911 to report the accident as Clapp and Bennett made their getaway. The 911 report was not the only one that Hamm and Handlin made. Hamm reported to his insurance company that he was hit while on a business errand, and the company paid him approximately $470,000. Handlin claimed that he suffered injuries as a result of the accident and received $40,000 from his insurance company. Clapp and Bennett were paid $1,000 by Handlin and promised that more would be paid when the insurance claims were settled.

Around the same time that the conspirators were planning and executing the staged vehicle accident, they were also planning to burn down Joe's Company Store and Christine's Lounge, another establishment located across the street from Joe's Company Store (a particularly dangerous part of town it seems). Clapp, Bennett, Hamm, and Handlin met at a restaurant to discuss the plan.

A few days prior to setting the fires at Joe's Company Store and Christine's Lounge, Handlin, Clapp, and Bennett removed goods and furniture from Joe's. On the night of December 12, 1996, Bennett and Clap set fire to Joe's, while Rogers attempted to ignite a blaze in Christine's Lounge. The idea behind setting fire to both buildings was to force the firefighters to choose which building they would save. Hamm assumed that the emergency response teams would attempt to extinguish the fire at Christine's Lounge first, because there were antique cars inside. Rogers's attempt to ignite a blaze within Christine's was foiled this time due to a damp flare. Nevertheless, Joe's Company Store was so extensively damaged that Hamm's insurance company paid the policy limits in claims. Handlin paid Clapp and Bennett for their parts in the arson.

To "take some of the heat off" of Illiopolis, Handlin and Hamm hired Clapp and Bennett to set fire to the Corn Crib Tavern in Latham, Illinois, about fourteen miles from Illiopolis. After the tavern was completely destroyed, Handlin paid Clapp and Bennett $1,000 for the job. When Clapp and Bennett complained that they had been promised more, Handlin told them to take it up with Hamm.

Shortly after the conspirators had reduced the Corn Crib Tavern to ashes, they began to plan another scheme to steal two truckloads of cigarettes from W.F. Brockman and Company, a wholesale distributor of tobacco, candy, and paper goods. Handlin approached Bennett and Clapp with the plan. Clapp refused, but Bennett agreed to participate. Hamm then approached Rogers, who also agreed to participate in the theft. Handlin made two trips, one with Bennett, the other with Hamm and Rogers, to Brockman's premises in order to case the area.

Early one morning in February 1997, Handlin, Bennett, and Rogers met near Brockman and Company. Handlin dropped Bennett and Rogers off within walking distance of the Brockman lot and then parked across the street as a lookout. Rogers and Bennett took longer

than anticipated to hot-wire one truck. As a result, the plan to steal two trucks was ditched. Calling Handlin on their radio, Bennett and Rogers made sure that the front of the Brockman lot was clear. Hearing that it was, they attempted their getaway. Unfortunately (or fortunately, depending on the perspective), the act of hot-wiring loosened the steering wheel to such a point that it fell off when Rogers drove over a set of railroad tracks. Rogers lost control of the truck and ended up crashing into a ditch. Bennett and Rogers ran back to Bennett's truck, which was parked nearby, and radioed Handlin with the news. The three drove back to Illiopolis empty handed. Empty-handed is how Rogers and Bennett left this job, because Hamm refused to pay them for their botched work.

The authorities must have noticed the fact that the area in and around Illiopolis was slowly being reduced to ashes, and in April 2001, the government convinced Bennett to cooperate with them. Wearing a wire, Bennett met with Handlin. Handlin [made various] inculpatory statements. . . . On July 11, 2001, Handlin, Hamm, Bennett, and Clapp were indicted. Handlin was charged with a total of eight counts, including conspiracy to defraud the United States, 18 U.S.C. § 371. . . . At the close of a six day trial, Defendant Handlin was found guilty of all the charges against him. . . . Handlin was sentenced to 180 months in prison and three years of supervised release, and he was ordered to pay $655,639.06 in restitution and $800 in special assessments. Defendant Handlin appealed.

Issue

Handlin first argues that the evidence showed multiple conspiracies as opposed to the one charged in the indictment. . . . The defendant was charged with conspiracy to commit arson and mail fraud. . . . An agreement need not be explicit; a tacit agreement may support a conspiracy conviction. The agreement may be proved by circumstantial evidence. . . .

Reasoning

As the number of individual incidents increased, so too did the evidence pointing to a single conspiracy. The evidence shows a conspiracy designed to generate income to the individuals involved by means of arson and mail fraud. Every single incident served to further the scheme, be it by generating money to the conspirators, wiping out competition, or covering up the existence and/or actions of the conspiracy. When viewed in light of this more specific purpose, it is clear that the co-conspirators embraced the common goal of the conspiracy and continued toward that goal over a period of years. . . .

Although all of the individual incidents are similar, they are not identical. However, the level of trust, cooperation, and delineation of duties among the various participants overcomes any doubt that this was anything other than a single, broad conspiracy. The conspiracy lasted for a number of years with a clear pattern of "doing business" and a small cast of characters. Either Handlin or Hamm would hire someone to do the more risky work. The hired individual would then be paid after the work was completed. In fact, by 1996 this process had solidified into Handlin hiring Rogers, Bennett, and/or Clapp to carry out the job. When the job was finished, Handlin would pay Rogers, Bennett, and/or Clapp. The evidence also shows that at least some of the fires were started in a similar manner—with a flare. This and other evidence shows, among other things, that the co-conspirators trusted each other enough to rely upon the promises made to each other; for example, to pay after work was completed or to supply an attorney if someone were to get caught. The long-term coordination is illustrated by the repeated use of the same individuals in the conspiracy over a number of years. Finally, there is a clear division of labor, which is shown by the fact that Hamm and Handlin acted as managers or foremen while Rogers, Bennett, and Clapp acted as employees of those managers.

Holding

Reviewing the evidence in the light most favorable to the government, as we must, we find that a reasonable juror could well have found the existence of a single conspiracy beyond a reasonable doubt.

Questions for Discussion

1. List the various criminal acts that compose the single conspiracy in *Handlin*. Why does the court conclude that there was a single conspiracy between the five defendants when not all of them were involved in the various criminal acts discussed in the case?
2. What would you argue as defense counsel in support of the contention that there were multiple conspiracies?
3. How would you rule as a judge in this case?

Cases and Comments

Termination of a Conspiracy. In *United States v. Jimenez Recio,* the U.S. Supreme Court considered whether individuals who joined a conspiracy to distribute illegal narcotics could be held liable for acting in furtherance of the conspiracy despite the fact that the government earlier had seized the drugs that were the object of the conspiracy. In November 1997, the police stopped a truck in Nevada and seized a large quantity of unlawful drugs. The government then arranged for the truck to be driven to the drivers' destination, a mall in Idaho. The original drivers cooperated with a government sting and contacted the individual that they were to meet. Three hours later, defendants Francisco Jimenez Recio and Adrian Lopez-Meza arrived at the mall. Recio took control of the truck and drove away from the mall. Lopez-Meza followed him in a car. The police stopped both individuals and charged them together with others with conspiracy to possess and to distribute unlawful narcotics.

The Ninth Circuit Court of Appeals reversed the defendants' conviction and held that the evidence was not sufficient to demonstrate that the defendants had joined the conspiracy prior to the seizure of drugs in Nevada. In other words, the conspiracy automatically had terminated, because the government, unknown to some of the conspirators, had "defeated the object of the conspiracy." Recio and Lopez-Meza therefore could not be held liable for joining the conspiracy.

The prosecution appealed this reversal to the U.S. Supreme Court, and Justice Stephen Breyer in a near-unanimous decision held that the essence of a conspiracy is the agreement to commit a crime, and the fact that the government has defeated the object of the conspiracy does not prevent individuals from agreeing to participate in criminal activity and being held criminally liable. There are good reasons for this rule. A conspiracy poses a threat to the public over and above the threat of the commission of the object of the conspiracy, because the participants in a conspiracy are likely to commit other crimes. Justice Breyer noted that the general consensus among legal commentators is that impossibility of success is not a defense to a conspiracy charge. A decision that government intervention terminates a conspiracy also would significantly interfere with police sting operations.

Do you agree with the judgment of the U.S. Supreme Court? See *United States v. Jimenez Recio et al.,* 527 U.S. 270 (2003).

You Decide

7.5 Raymond F. Everritt hired John Henry McDuffie to burn down Everritt's financially unprofitable service station. McDuffie recruited his teenage grandson, Jamie Weeks, to assist him. This effort proved unsuccessful; McDuffie then hired Roosevelt Cox, and together they burned down the station. Everritt's insurance company refused to pay based on the suspicious circumstances surrounding the fire. As a result, McDuffie was unable to pay Cox the $1,500 he had promised and was worried that Cox "would not keep quiet." McDuffie lured Cox into a meeting and killed him with an axe. Weeks assisted McDuffie in disposing of the body. Everritt's insurance claim was later settled for $123,065.

Nine years later, Everritt, McDuffie, and Weeks were charged with Cox's murder. Weeks, who was twenty-six at the time of the trial, testified that shortly after the murder, Everritt had given McDuffie a set of tires to conceal the fact that McDuffie had used his truck to transport the victim's body. Everritt later reportedly warned Weeks to "keep his mouth shut." The prosecution argued that Cox's murder was necessary to conceal the conspiracy to commit arson, and Everritt therefore should be considered responsible.

Was the murder "reasonably foreseeable as a necessary or natural consequence of the unlawful agreement"? See *Everritt v. State,* 588 S.E.2d 691 (Ga. 2003).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

In August 2007, Atlanta Falcons star quarterback Michael Vick pled guilty to a conspiracy in "Aid of Unlawful Activities and to Sponsor a Dog in an Animal Fighting Venture." Vick along with three longtime friends admitted to having been involved in a conspiracy over the course of six years that included traveling across state lines to engage in unlawful dog fighting, organizing and staging dog fights, betting on dog fights, and training dogs in preparation for fights. Vick also admitted to having been directly involved in killing pit bull dogs that were not considered sufficiently ferocious to fight through "various methods, including hanging and drowning."

Dog fighting is prohibited in all fifty states, and crossing state lines to engage in dog fighting constitutes a federal offense. Vick was sentenced to twenty-three months in prison and soon thereafter was transferred to Leavenworth Prison in Kansas where he entered into a drug treatment program that earned him early release. He also agreed as part of his plea bargain to establish a $1 million account for the care and rehabilitation of the dogs that he had trained to fight. In response to Vick's conviction, National Football League Commissioner Roger Godell suspended Vick from the league and issued a statement that condemned dog fighting as "cruel, degrading and illegal" and reminded players that dog fighting will be subjected to "prompt and significant discipline."

The case arose when a search of Vick's property in rural southeastern Virginia in conjunction with a narcotics investigation led to the discovery of a dog fighting ring, seizure of equipment to train dogs for fighting, and seizure of fifty-one dogs, most of whom were scared and starving. Vick was determined to be a "big boy" in the world of dog fighting. He had purchased the fifteen-acre property and along with his three friends had established Bad Newz Kennels and financed a dog fighting enterprise.

The arrest and conviction of Vick and his friends drew attention to the shadowy world of the blood sport of dog fighting. Roughly 40,000 people in the United States are thought to be involved in dog fighting, which has developed into a multimillion-dollar industry. Wealthy dog trainers like Vick regularly bet as much as $40,000 on a single fight. These brutal exhibitions can last several hours and leave the dogs battered and brutalized.

Athletics had been Vick's ticket out of the financially depressed East End section of Newport News, Virginia. In 1999, in Vick's first year of college football at Virginia Tech University, ESPN recognized Vick as the nation's top college player, and he was named the first-ever recipient of the Archie Griffin Award as college football's most valuable player. He also was voted the Newcomer of the Year in the Big East Conference and the league's Offensive Player of the Year, and Vick led Virginia Tech into the national title game against Florida State. He entered the professional draft following his second successful year as quarterback at Virginia Tech and was the number one pick in the 2001 National Football League draft.

Vick set a number of professional records for rushing yards gained by a quarterback and was named to the Pro Bowl on three occasions. As Vick entered the seventh year of his career as the quarterback and public face of the Atlanta Falcons, he signed a $130 million contract with a ten-year extension of his previous contract and a $37 million signing bonus. He was ranked among the ten richest athletes and was considered to be among the top fifty celebrities in the U.S., with lucrative endorsement contracts from leading firms including Nike, Coca-Cola, and Kraft.

After his arrest on dog fighting charges, various athletes came to Vick's defense, claiming that what he did in private was his business and that he was being punished for pursuing an activity that was part of the male culture of the American South. At his sentencing hearing, Vick apologized to Judge Henry Hudson for his actions. Hudson was skeptical about Vick's alleged contrition and criticized him for having let down millions of young people who looked up to him and observed that this was not a "momentary lack of judgment. . . . You were a full partner [in the conspiracy]."

Michael Vick's arrest was part of a national crackdown on dog fighting. In March 2007, a combined local, state, and federal law enforcement team disrupted a dog fighting network in Ohio, arrested two dozen people, and seized sixty dogs. Should dog fighting be considered a crime? Did Michael Vick deserve a sentence of twenty-three months in prison? The future of the forty-seven dogs that have survived is uncertain; it is hoped that as many as forty-two may eventually be nursed back to health and adopted by welcoming families.

Solicitation

Solicitation is defined as commanding, hiring, or encouraging another person to commit a crime. The crime was largely unknown until the prosecution of the 1801 English case of *Rex v. Higgins,* in which Higgins was convicted of unsuccessfully soliciting a servant to steal his master's goods. A number of states do not have solicitation statutes and continue to apply the common law of solicitation. States with modern statutory schemes have adopted various approaches. Some punish solicitation of all crimes, and others limit solicitation to felonies, particular felonies, or certain classes of felonies. Solicitation generally results in a punishment slightly less severe or equivalent to the punishment that is usual for the crime solicited.[52]

We all read about the greedy spouse who approaches a contract killer to murder his or her partner in order to collect insurance money. The act of proposing the killing of a spouse with the intent that the murder be carried out constitutes solicitation. Solicitation is a form of accomplice liability, and in the event that the spouse is murdered, both the greedy spouse and contract killer are guilty of homicide. In the event the assassination proves unsuccessful, both the greedy spouse and inaccurate assassin are guilty of attempted murder. An agreement between the two that leads to an overt act that is not carried out results in liability for a conspiracy. The contract killer, of course, may refuse to become involved with the greedy spouse. Nevertheless, the spouse is guilty of solicitation; the crime of solicitation is complete when a spouse attempts to hire the killer.

Public Policy

Solicitation remains a controversial crime; this accounts for the fact that some states have not yet enacted solicitation statutes. The thinking is that there is no necessity for the crime of solicitation. Solicitation, it is argued, is not a threat to society until steps are taken to carry out the scheme. At this point, the agreement can be punished as a conspiracy. A solicitor depends on the efforts of others, and simply approaching another person to commit a crime does not present a social danger. There is also the risk that individuals will be convicted based on a false accusation or as a result of a casual remark. Lastly, punishing individuals for solicitation interferes with freedom of speech. As observed by a nineteenth-century court, holding every individual who "nods or winks" to a married person on the sidewalk "indictable for soliciting to adultery . . . would be a dangerous and difficult rule of criminal law to administer."[53]

On the other hand, there are convincing reasons for punishing solicitation:

- *Cooperation Among Criminals*. Individuals typically encourage and support one another, which creates a strong likelihood that the crime will be committed.
- *Social Danger.* An individual who is sufficiently motivated to enlist the efforts of a skilled professional criminal clearly poses a continuing social danger.
- *Intervention*. Solicitation permits the police to intervene before a crime is fully implemented. The police should not be placed in the position of having to wait for an offense to occur before arresting individuals intent on committing a crime.

States typically protect individuals against wrongful convictions by requiring corroboration or additional evidence to support a charge of solicitation. This might involve an e-mail, a voice recording, or witnesses who overheard the conversation. As for the First Amendment, society possesses a substantial interest in prohibiting acts such as the solicitation of adolescents by adults for sexual activity on computer chat rooms that more than justifies any possible interference with individual self-expression.[54]

The Crime of Solicitation

For an international perspective on this topic, visit the study site.

Solicitation involves a written or spoken statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another person to commit a crime with the purpose that the other person commit the crime. You are not liable for a comment that is intended as a joke or uttered out of momentary frustration.

The *mens rea* of solicitation requires a specific intent or purpose that another individual commit a crime. You would not be liable in the event that you humorously advise a friend to "blow up" the expensive car of a neighbor who regularly parks in your friend's parking space. On the other hand, you might harbor a long-standing grudge against the neighbor and genuinely intend to persuade your friend to destroy the automobile.

The *actus reus* of solicitation requires an effort to get another person to commit a crime. A variety of terms are used to describe the required act, including *command, encourage,* and *request.* The crime of solicitation occurs the moment an individual urges, asks, or encourages another to commit a crime with the requisite intent. The individual is guilty of solicitation even in those instances in which the other person rejects the offer or accepts the offer and does not commit the crime.

There are three important points on *actus reus:*

1. The crime is complete the moment the statement requesting another to commit a crime is made. This is the case despite the fact that an additional step, such as a phone call or the payment of money, is required to trigger the crime.
2. A statement justifying or hoping that the neighbor's automobile is damaged is not sufficient. There must be an effort to get another person to commit the crime. A solicitation may be direct or indirect. For instance, in cases involving the enticement of children into sexual activity, courts will consider a defendant's use of suggestive and seductive remarks and materials.
3. The Model Penal Code provides that an individual is guilty of solicitation even in instances in which a letter asking others to commit a crime is intercepted by prison authorities and does not reach gang members outside of prison.

The Statutory Standard

Examine the North Dakota statute on solicitation. Pay special attention to the crimes covered in the statute, the corroboration requirement, the provision for an overt act, and the punishment of solicitation.

North Dakota Century Code 12.1-06-03.

1. A person is guilty of criminal solicitation if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a particular felony, whether as principle or accomplice, with intent to promote or facilitate the commission of that felony, under circumstances strongly corroborative of that intent, and if the person solicited commits an overt act in response to the solicitation. . . .
2. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility or culpability, or other incapacity or defense.
3. Criminal solicitation is an offense of the class directly below that of the offense solicited.

Model Penal Code

Section 5.02. Criminal Solicitation

(1) . . . A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

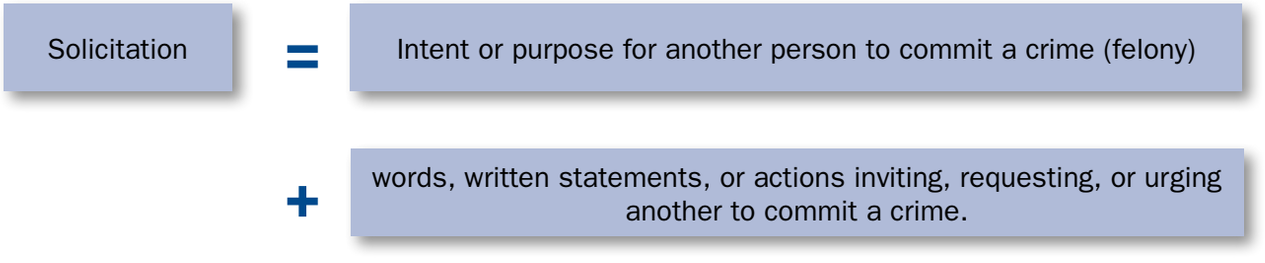
(2) . . . It is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

(3) . . . It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Analysis

1. Solicitation for a felony or misdemeanor is a crime. This also includes solicitation for an attempt and aiding and abetting.
2. An individual is guilty of solicitation even in those instances that the solicitation is not communicated.
3. The defense of renunciation is recognized in those instances that the other person is persuaded not to commit or prevented from committing the offense.

The Legal Equation



Was Cotton guilty of criminal solicitation?

State v. Cotton, *790 P.2D 1050 (1990),* *Opinion by: Donnelly, J.*

Facts

Defendant appeals his convictions of two counts of criminal solicitation.

In 1986, defendant, together with his wife Gail, five children, and a fourteen-year-old stepdaughter, moved to New Mexico. A few months later, defendant's wife, children, and stepdaughter returned to Indiana. Shortly thereafter, defendant's stepdaughter moved back to New Mexico to reside with him. In 1987, the New Mexico Department of Human Services investigated allegations of misconduct involving defendant and his stepdaughter. Subsequently the district court issued an order awarding legal and physical custody of the stepdaughter to the Department, and she was placed in a residential treatment facility in Albuquerque.

In May 1987, defendant was arrested and charged with multiple counts of criminal sexual penetration of a minor and criminal sexual contact with a minor. While in the Eddy County Jail awaiting trial on those charges, defendant discussed with his cellmate, James Dobbs, and with Danny Ryan, another inmate, his desire to persuade his stepdaughter not to testify against him. During his incarceration, defendant wrote numerous letters to his wife; in several of his letters he discussed his strategy for defending against the pending criminal charges.

On September 23, 1987, defendant addressed a letter to his wife. In that letter he requested that she assist him in defending against the pending criminal charges by persuading his stepdaughter not to testify at his trial. The letter also urged his wife to contact the stepdaughter and influence her to return to Indiana or give the stepdaughter money to leave the state so that she would be unavailable to testify. After writing this letter, defendant gave it to Dobbs and asked him to obtain a stamp for it so that it could be mailed later. Unknown to defendant, Dobbs removed the letter from the envelope, replaced it with a blank sheet of paper, and returned the sealed stamped envelope to him. Dobbs gave the original letter written by defendant to law enforcement authorities, and it is undisputed that defendant's original letter was never in fact mailed nor received by defendant's wife.

On September 24 and 26, 1987, defendant composed another letter to his wife. He began the letter on September 24 and continued it on September 26, 1987. In this letter defendant wrote that he had revised his plans and that this letter superseded his previous two letters. The letter stated that he was arranging to be released on bond; that his wife should forget about his stepdaughter for a while and not come to New Mexico; that defendant would request that the court permit him to return to Indiana to obtain employment; that his wife should try to arrange for his stepdaughter to visit her in Indiana for Christmas; and that his wife should try to talk the stepdaughter out of testifying or to talk her into testifying favorably for defendant. Defendant also said in the letter that his wife should "warn" his stepdaughter that if she did testify for the State, "it won't be nice and she'll make [New Mexico] news," and that, if the stepdaughter was not available to testify, the prosecutor would have to drop the charges against defendant.

Defendant secured his release on bail on September 28, 1987, but approximately twenty-four hours later was rearrested on charges of criminal solicitation and conspiracy. At the time defendant was rearrested, law enforcement officers discovered, and seized from defendant's car, two personal calendars and other documents written by defendant. It is also undisputed that the second letter was never mailed to defendant's wife.

Following a jury trial, defendant was convicted on two counts of criminal solicitation. The criminal solicitations were alleged to have occurred on or about September 23, 1987. Count 1 of the amended criminal information alleged that defendant committed the offense of criminal solicitation by soliciting another person "to engage in conduct constituting a felony to-wit: Bribery or Intimidation of a Witness (contrary to Sec. 30-24-3, NMSA 1978)." Count 2 alleged that defendant committed the offense of criminal solicitation by soliciting another "to engage in conduct constituting a felony, to-wit: Custodial Interference (contrary to Sec. 30-4-4, NMSA 1978)."

The offense of criminal solicitation, as provided in New Mexico Statutes Annotated (NMSA) 1978 section 30-28-3, is defined in applicable part as follows:

> A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

Issue

Defendant contends that the record fails to contain the requisite evidence to support the charges of criminal solicitation against him, because defendant's wife, the intended

solicitee, never received the two letters. In reviewing this position, the focus of our inquiry necessarily turns on whether or not the record contains proper evidence sufficient to establish each element of the alleged offenses of criminal solicitation beyond a reasonable doubt.

The State's brief states that "neither of these letters actually reached Mrs. Cotton, but circumstantial evidence indicates that other similar letters did reach her during this period." The State also argues that under the express language of section 30-28-3(A), where defendant is shown to have the specific intent to commit such offense and "otherwise attempts" its commission, the offense of criminal solicitation is complete. The State reasons that even in the absence of evidence indicating that the solicitations were actually communicated to or received by the solicitee, under our statute proof of defendant's acts of writing the letters and attempts to mail or forward them, together with proof of his specific intent to solicit the commission of a felony, constitutes sufficient proof to sustain a charge of criminal solicitation. We disagree.

Reasoning

The offense of criminal solicitation, as defined in section 30-28-3 by our legislature, adopts, in part, language defining the crime of solicitation as set out in the Model Penal Code promulgated by the American Law Institute. "As enacted by our legislature, however, Section 30-28-3 significantly omits one section of the Model Penal Code, Section 5.02(2), which pertains to the effect of an uncommunicated criminal solicitation. Under the Model Penal Code, a person is guilty of "solicitation to commit a crime" when

> with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

It is immaterial "that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication."

However, as enacted by our legislature, section 30-28-3 sets out the offense of criminal solicitation in a manner that differs in several material respects from the proposed draft of the Model Penal Code. Among other things, section 30-28-3 specifically omits that portion of the Model Penal Code subsection declaring that an uncommunicated solicitation to commit a crime may constitute the offense of criminal solicitation. This omission, we conclude, indicates an implicit legislative intent that the offense of solicitation requires some form of actual communication from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation.

Holding

The mere writing and sending of letters by defendant to his wife, without proof of solicitation of a specific felony and proof of defendant's intent to induce another to commit such crime, is insufficient to establish proof of criminal solicitation.

The State contends that under the language of section 30-28-3, where proof is presented that defendant has the requisite intent and has "otherwise attempt[ed] to promote or facilitate another person to engage in conduct constituting a felony within or without the state," the offense of solicitation is complete. This contention must fail, because section 30-28-3 is silent as to any legislative intent to declare that uncommunicated solicitations shall constitute a criminal offense.

Commission of criminal solicitation does not require, however, that defendant directly solicit another; the solicitation may be perpetrated through an intermediary. Thus if A solicits B in turn to solicit C to commit a felony, A would be liable even where he did not directly contact C, because A's solicitation of B itself involves the commission of the offense. Where the intended solicitation is not in fact communicated to an intended intermediary or to the person sought to be solicited, the offense of solicitation is incomplete; although such evidence may support, in proper cases, a charge of attempted criminal solicitation. Defendant's convictions for solicitation are reversed, and the case is remanded with instructions to set aside the convictions for criminal solicitation.

Questions for Discussion

1. What is the holding of the New Mexico court in *Cotton?*
2. Explain why the result likely would be different under the Model Penal Code.
3. As a legislator, would you favor the approach of the Model Penal Code or the State of New Mexico?
4. Could Cotton be held liable for attempted solicitation?
5. Do we need a crime of solicitation?

You Decide

7.6 Defendant, sixteen-year-old Lauren Elizabeth Crowe, was indicted for the first-degree murder of her mother, Janet Evangeline Crowe Mundy, and for soliciting Christopher Albert Tarantino to commit the felony of first-degree murder, and for conspiring with Tarantino to commit first-degree murder. She entered pleas of not guilty. A jury found defendant not guilty of first-degree murder and guilty of solicitation to commit first-degree murder and conspiracy to commit first-degree murder.

On the morning of July 10, 2004, Crowe's mother was fatally shot and stabbed in her home. She suffered four gunshot wounds and multiple stab wounds and was found partially clothed lying on top of some bedding in the doorway between the kitchen and her bedroom. The house appeared to have been ransacked. Crowe called 911 at 5:01 A.M. to report her mother's murder. Crowe reported that she had been in bed asleep and had heard a car drive up to the house and a window break, and as she came down the stairs to investigate, she had found her mother dead on the floor. Crowe later told the investigators that she had hidden in the closet bedroom when she heard the gunshots. She reportedly saw a tall, slim African American male get into a vehicle with a Tennessee license plate and an orange sticker on the back. She also later told investigators that her stepfather was responsible for the murder and recounted a fight that her stepfather had had with her mother earlier in the day.

Crowe then changed her story and told investigators that Tarantino, her former boyfriend, arrived at her mother's home at 4:15 A.M. with a gun. She met him outside and "knew what was going to happen." Tarantino entered the house and shot her mother. Crowe followed him into the home and found her mother lying on the floor pleading for help. Crowe then left the house, and Tarantino stabbed her mother to death.

Crowe claimed that Tarantino forced her to help him clean up, gave her a flashlight, and told her to break out a window to make it look like a break-in. She testified that Tarantino threatened to "go and get [her] grandmother" if she did not help him and told her she "was next." Crowe and her mother had obtained a domestic violence order against Tarantino in May. Crowe and Tarantino "repeatedly" disregarded the order and Crowe asked her mother to have the order lifted, because she liked Tarantino and wanted to start seeing him again. A book entitled *Anatomy of Motive* was found in Crowe's bedroom; it had a place-holding indentation on a section referencing "someone killing their mother" through the use of a nine-millimeter pistol. Several nine-millimeter shell casings and a bullet were recovered at the scene at and around the victim's body.

Crowe contended that the trial court committed an error by denying her motion to dismiss the charge of solicitation to commit murder at the close of the prosecution's evidence and that this charge should not have been presented to the jury. The prosecution offered into evidence written reports of two interviews with Crowe on July 10 and July 11, 2004, taken by Detective Dwayne Anders and Agent Tom Frye. The July 11, 2004, report stated as follows:

"[Defendant] said she wasn't supposed to be . . . [at home with her mother when Tarantino arrived on the night he killed defendant's mother], that was the plan. [Defendant] said she shouldn't have let [Tarantino] in because she knew what was going to happen. . . . [Defendant] said she knew that there was a chance that [Tarantino] was coming that night. . . . [Defendant] said she had remorse about thinking up such a thing and not stopping it. [Defendant] said she could have stopped it.

"[Defendant] said it was supposed to happen Friday. . . . [Defendant] said [Tarantino] asked her what time he could come over and if 1:30 or 2:00 [A.M.] would be ok. [Defendant] said [Tarantino] said he was going to do it and [defendant] said she . . . told [Tarantino] to do just whatever he wanted to do because she was tired of living like this."

The State also presented the testimony of Shane Reid, a friend of Crowe and Tarantino. Reid testified that Crowe had stated on two occasions that "she wanted her mother gone." Reid testified that she had told this to Tarantino and to a group of her friends in the springtime.

Did Crowe solicit Tarantino to kill her mother? See *State v. Crowe,* 656 S.E.2d 688 (N.C. App. 2008).

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

Attempt, solicitation, and *conspiracy* are inchoate crimes or offenses that punish the beginning steps toward a crime. All require a *mens rea* involving a specific intent or purpose to achieve a crime as well as an *actus reus* that entails an affirmative act toward the commission of a crime. Each of these offenses is subject to the same or a lesser penalty than the crime that is the criminal objective.

An **attempt** involves three elements:

- an intent or purpose to commit the crime,
- an act toward the commission of the crime, and
- a failure to commit the crime.

A complete (but imperfect) attempt occurs when a defendant takes every act required to complete the offense and fails to succeed in committing the crime. An incomplete attempt arises when an individual abandons or is prevented from completing an attempt.

An individual must possess the intent to achieve a criminal objective. There are two approaches to *actus reus,* the objective and the subjective. The objective centers on the proximity of an individual's acts to the commission of a crime. The subjective approach focuses on whether an individual possesses an intent to commit a crime. Under this approach, an attempt is complete at the point that a defendant's acts are sufficient to establish a criminal intent. Objective approaches include the common law last step analysis as well as the physical proximity test. The unequivocality test is an example of the subjective approach.

The Model Penal Code adopts a substantial step test. This requires that an act must strongly support an individual's criminal purpose. The approach of the Model Penal Code extends attempt to acts that might be considered mere preparation under the objective approach. Among the acts that constitute an attempt under the substantial step test and that are considered "strongly corroborative of an actor's criminal purpose" are

- lying in wait,
- enticing of a victim to go to the place contemplated for the commission of a crime,
- surveying a site contemplated for the commission of a crime,
- unlawful entry of a structure or vehicle in which a crime is contemplated,
- possession of materials to be employed in the commission of a crime, and
- soliciting an individual to engage in conduct constituting an element of a crime.

A factual impossibility does not constitute a defense to an attempt to commit a crime. This is based on the reasoning that the offender has demonstrated a dangerous criminal intent and a determination to commit an offense. The factual circumstance that prevents an individual from actually completing the offense is referred to in some state statutes as an extraneous factor. This should be distinguished from a legal impossibility that is recognized as a defense. Legal impossibility arises in those instances in which an individual wrongly believes that he or she is violating the law. Inherent impossibility arises where an individual undertakes an act that could not possibly result in a crime.

An individual may avoid criminal liability by abandoning a criminal attempt under circumstances manifesting a complete and voluntary renunciation of a criminal purpose. Individuals abandoning a criminal purpose based on the intervention of outside or extraneous factors remain criminally liable.

Conspiracy comprises an agreement between two or more persons to commit a criminal act. Most modern state statutes require an affirmative act in furtherance of this criminal purpose. The common law crime of conspiracy did not merge into the completed criminal act. Today an individual may be convicted of both the substantive offense that is the object of the conspiracy and of the conspiracy itself.

The centerpiece of a charge of conspiracy is an agreement. There is rarely proof of a formal agreement, and an agreement typically must be established by examining the relationship, conduct, and circumstances of the parties. The overt act requirement is satisfied by even an insignificant act in furtherance of a conspiracy. The *mens rea* of conspiracy is the intent or purpose that the object of the agreement is accomplished.

The plurality requirement provides that a conviction for conspiracy requires that at least two persons possess both the intent to agree and the intent to achieve the crime that is the object of the conspiracy. This joint or bilateral approach to conspiracy is distinguished from the Model Penal Code's unilateral approach, which examines whether a single individual agreed to enter into a conspiracy, rather than focusing on whether two or more persons entered into an agreement.

Most complex conspiracies can be categorized as either a wheel or a chain conspiracy. A chain conspiracy entails communication and cooperation by individuals linked together in a vertical relationship to achieve a criminal objective. A wheel conspiracy involves a single person or group that serves as a hub that provides a common core connecting various independent individuals or spokes.

Conspirators are liable for all criminal offenses taken in furtherance of a conspiracy. As a result, defendants will typically attempt to establish that there were multiple conspiracies rather than a single conspiracy. Wharton's rule states that individuals involved in a crime that requires the cooperative action of two persons cannot constitute a conspiracy. The *Gebardi* rule provides that an individual who is in a class of persons who are excluded from criminal liability under a statute cannot be considered a conspirator.

A conspiracy charge provides prosecutors with various advantages, such as joining the conspirators in a single trial and bringing the charges in any jurisdiction in which an agreement or act in furtherance of the conspiracy is committed.

Solicitation involves a written or spoken statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another person to commit a crime with the purpose that the other individual commit the crime. A solicitation is complete the moment the statement requesting another to commit a crime is made. The solicitation need not be actually communicated.

Chapter Review Questions

1. What are the *mens rea* and *actus reus* of inchoate crimes?
2. Distinguish the three categories of inchoate crimes.
3. Provide an example of each crime.
4. Compare the subjective and objective approaches to criminal attempts.
5. How does the Model Penal Code substantial step test differ from the test of physical proximity to attempts? What types of acts satisfy the substantial step test?
6. Discuss and distinguish between legal and factual impossibility.
7. Why is there a defense of abandonment for attempts? What are the legal elements of this defense?
8. What are the reasons for punishing conspiracy?
9. Discuss the *mens rea* and *actus reus* of conspiracy.
10. Why do some states require an overt act for a conspiracy?
11. Is there a difference between the bilateral and unilateral approaches to a conspiratorial agreement?
12. Distinguish between the wheel and chain approaches to conspiracy. Explain why defendants may argue that there are multiple conspiracies rather than a single conspiracy.
13. How does a charge of conspiracy assist a prosecutor in convicting a defendant?
14. Why did Congress adopt the RICO statute?
15. What are the *mens rea* and *actus reus* of solicitation?
16. At what point is the crime of solicitation complete? Is a solicitation required to reach the individual to whom it is directed?
17. How does society benefit by punishing inchoate crimes? Would society suffer in the event that these offenses did not exist?

Legal Terminology

abandonment
attempt
bilateral
chain conspiracy
complete attempt
conspiracy
criminal attempt
extraneous factor
factual impossibility
Gebardi rule
inchoate crimes
incomplete attempt
inherent impossibility
last step approach
legal impossibility
objective approach to criminal attempt
overt act
physical proximity test
plurality requirement
preparation
res ipsa loquitur
solicitation
subjective approach to criminal intent
substantial step test
unequivocality test
unilateral
Wharton's rule
wheel conspiracy

Criminal Law on the Web

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1. Learn about the law, sociology, and culture of dog fighting.
2. Read an Illinois decision that explores whether a defendant may be convicted of two counts of soliciting a murder where one of the individuals solicited took no steps to commit the murder and the other carried out the killing. The case also raises the question whether defendant may be held liable for both solicitation to murder and murder.

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Joshua Dressler, *Understanding Criminal Law,* 3rd ed. (New York: Lexis, 2001), pp. 373–458. A good introduction to the law of inchoate crimes.

George P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000), pp. 239–328. An in-depth exploration of the philosophical issues in the law of attempt. Fletcher also provides a brief discussion of whether the crime of conspiracy is consistent with the philosophical requirements of Anglo American criminal law.

Wayne R. LaFave, *Criminal Law,* 3rd ed. (St. Paul, MN: West Publishing, 2000), pp. 524–650. A comprehensive discussion of the law of inchoate crimes.

Rollin M. Perkins and Ronald N. Boyce, *Criminal Law,* 3rd ed. (Mineola, NY: Foundation Press, 1982), pp. 611–658, 680–714. A review of the historical development and background of inchoate crimes.

Richard G. Singer and John Q. La Fond, *Criminal Law Examples and Explanations,* 2nd ed. (New York: Aspen, 2001), pp. 131–197, 239–327. A clear and concise summary with a helpful introduction to the Model Penal Code. The authors also provide useful review questions.

8 Justifications

Did the defendant have the right to kill her husband in self-defense?

The trial was replete with testimony of forced prostitution, beatings, and threats on the defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from Norman, he had come after her and beat her. Indeed, within twenty-four hours prior to the shooting, defendant had attempted to escape by trying to take her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. Experts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. . . .

Core Concepts and Summary Statements

Introduction

The American system of justice is based on a presumption of innocence and proof beyond a reasonable doubt. The affirmative defense of justification relieves an individual of criminal liability in those instances in which society considers that an otherwise criminal act benefits society and should be encouraged. Excuses, in contrast, are defenses to acts that deserve condemnation but that do not result in criminal liability because of a disability such as infancy or insanity.

Mitigating Circumstances

Facts that may not be relevant for justification or excuse may be considered at sentencing to mitigate a defendant's sentence.

Self-Defense

Self-defense justifies the use or threat of force when an individual reasonably believes that he or she confronts the imminent, immediate, and unlawful infliction of death or serious bodily harm.

Defense of Others

The defense of others provides a privilege to intervene to defend another individual. Some jurisdictions follow the *alter ego rule,* which provides that the intervener "stands in the shoes" of the person whom he or she is defending. Others follow a reasonable person test.

Defense of the Home

Deadly force is justified against an intruder who is reasonably believed to intend to commit a felony. Some statutes restrict this to "forcible felonies." There is no duty to retreat under the "castle doctrine."

Execution of Public Duties

The enforcement of criminal law requires the police and other justice professionals to interfere with individuals' life, liberty, and property. These acts are justified by the need to maintain law and order.

Resisting Unlawful Arrests

The right to forcibly resist an unlawful arrest is no longer recognized as the rule in most states. This remains the law in twelve states. The rule is based on a number of reasons, including the interest in protecting innocent individuals from being exposed to the harsh conditions of imprisonment.

Necessity

Criminal acts are justified when undertaken to prevent a greater, imminent, and immediate harm in those instances in which an individual lacks legal alternatives.

Consent

Consent generally does not provide a defense to a criminal act other than in the case of incidental contact, sports, and socially beneficial activities.

Introduction

The Prosecutor's Burden

The American legal system is based on the **presumption of innocence**. A defendant may not be compelled to testify against himself or herself, and the prosecution is required as a matter of the due process of law to establish every element of a crime beyond a reasonable doubt to establish a defendant's guilt. This heavy prosecutorial burden also reflects the fact that a criminal conviction carries severe consequences and individuals should not be lightly deprived of their liberty. Insisting on a high standard of guilt assures the public that innocents are not being falsely convicted and that individuals need not fear that they will suddenly be snatched off the streets and falsely convicted and incarcerated.[1]

The prosecutor presents his or her witnesses in the **case-in-chief**. These witnesses are then subject to cross-examination by the defense attorney. The defense also has the right to introduce evidence challenging the prosecution's case during the **rebuttal** stage at trial. A defendant, for instance, may raise doubts about whether the prosecution has established that the defendant committed the crime beyond a reasonable doubt by presenting alibi witnesses.

A defendant is to be acquitted if the prosecution fails to establish each element of the offense beyond a reasonable doubt. Judges have been reluctant to reduce the beyond a reasonable doubt standard to a mathematical formula and stress that a "high level of probability"[2] is required and that jurors must reach a "state of near certitude" of guilt.[3] The classic definition of reasonable doubt provides that the evidence "leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge."[4]

A defendant is entitled to file a motion for judgment of acquittal at the close of the prosecution's case or prior to the submission of the case to the jury. This motion will be granted if the judge determines that the evidence is unable to support any verdict other than acquittal, viewing the evidence as favorably as possible for the prosecution. The judge, in the alternative, may adhere to the standard procedure of submitting the case to the jury following the close of the evidence and instructing the jurors to acquit if they have a reasonable doubt concerning one or more elements of the offense.[5]

Affirmative Defenses

In addition to attempting to demonstrate that the prosecution's case suffers from a failure of proof beyond a reasonable doubt, defendants may present **affirmative defenses**, or defenses in which the defendant typically possesses the **burden of production** as well as the **burden of persuasion**.

Justifications and **excuses** are both affirmative defenses. The defendant possesses the burden of producing "some evidence in support of his defense." In most cases, the defendant then also has the burden of persuasion by a preponderance of the evidence, which is a balance of probabilities, or slightly more than fifty percent. In some jurisdictions, the prosecution retains the burden of persuasion and is responsible for negating the defense by a reasonable doubt.[6]

Assigning the burden of production to the defendant is based on the fact that the prosecution cannot be expected to anticipate and rebut every possible defense that might be raised by a defendant. The burden of rebutting every conceivable defense ranging from insanity and intoxication to self-defense would be overwhelmingly time-consuming and inefficient. Thus, it makes sense to assign responsibility for raising a defense to the defendant. The U.S. Supreme Court has issued a series of rather technical judgments on the allocation of the burden of persuasion. In the last analysis, states are fairly free to place the burden of persuasion on either the defense or prosecution. As noted, in most instances, the prosecution has the burden of persuading the jury beyond a reasonable doubt to reject the defense.

There are two types of affirmative defenses that may result in acquittal:

- *Justifications*. These are defenses to otherwise criminal acts that society approves and encourages under the circumstances. An example is self-defense.
- *Excuses*. These are defenses to acts that deserve condemnation, but for which the defendant is not held criminally liable because of a personal disability such as infancy or insanity.

Professors Singer and La Fond illustrate the difference between these concepts by noting that justification involves illegally parking in front of a hospital in an effort to rush a sick infant into the emergency room, and an excuse entails illegally parking in response to the delusional demand of "Martian invaders."[7] In the words of Professor George Fletcher, "Justification speaks to the rightness of the act; an excuse, to whether the actor is [mentally] accountable for a concededly wrongful act."[8]

In the common law, there were important consequences resulting from a successful plea of justification or excuse. A justification resulted in an acquittal, whereas an excuse provided a defendant with the opportunity to request that the king exempt him or her from the death penalty. Eventually there came to be little practical difference between being acquitted by reason of a justification or an excuse.[9]

Scholars continue to point to differences between categorizing an act as justified as opposed to excused, but these have little practical significance for most defendants.[10] You nevertheless should reflect on whether you consider the acts discussed in this chapter as legally justifiable.[11] The recognition of otherwise criminal acts as justifiable constitutes a morally significant statement concerning our social values.

There are various theories for the defense of justification, none of which fully account for each and every justification defense.[12]

- *Moral Interest.* An individual's act is justified based on the protection of an important moral interest. An example is self-defense and the preservation of an individual's right to life.
- *Superior Interest.* The interests being preserved outweigh the interests of the person who is harmed. The necessity defense authorizes an individual to break the law to preserve a more compelling value. An example might be the captain of a ship in a storm who throws luggage overboard to lighten the load and preserve the lives of those on board.
- *Public Benefit.* An individual's act is justified on the grounds that it is undertaken in service of the public good. This includes a law enforcement officer's use of physical force against a fleeing felon.
- *Moral Forfeiture.* An individual perpetrating a crime has lost the right to claim legal protection. This explains why a dangerous aggressor may justifiably be killed in self-defense.

A defendant who establishes a *perfect defense* is able to satisfy each and every element of a justification defense and is acquitted. An *imperfect defense* arises in those instances in which the requirements of the defense are not fully satisfied. For instance, a defendant may use excessive force in self-defense or possess a genuine, but unreasonable, belief in the need to act in self-defense. A defendant's liability in these cases is typically reduced, for example, in the case of a homicide to manslaughter and to a lower level of guilt in the case of other offenses.[13]

Mitigating Circumstances

Evidence that is not relevant for justification or excuse may still be relied on during the sentencing stage as a mitigating circumstance that may reduce a defendant's punishment. The jury in death penalty cases is specifically required to consider mitigating as well as aggravating circumstances in determining whether the defendant should be subject to capital punishment or receive a life sentence. An example is *State v. Moore,* in which a nineteen-year-old defendant was convicted of murder during an aggravated robbery and kidnapping. The Ohio Supreme Court affirmed the defendant's death sentence and ruled that the defendant's youth, lack of criminal record, remorse, and religious conversion only modestly mitigated the offense and were clearly outweighed by the aggravating circumstances of the offense. The Ohio Supreme Court also ruled that the defendant's alcohol and drug addiction were not mitigating.[14]

A defendant's *"good motive"* in committing a mercy killing of a severely sick family member may not be considered in determining guilt or innocence and is only considered at sentencing. The law is concerned with *what* crime an individual committed, not *why* he or she committed the crime. During the Vietnam conflict, the Fourth Circuit Court of Appeals ruled that a defendant's **good motive defense** of opposition to what he viewed as a morally reprehensible war could not justify his destruction of draft records. The court of appeals explained that absolving the defendant from guilt based on his "moral certainty" that the war in Vietnam is wrong also would require the

acquittal of individuals who might commit breaches of the law to demonstrate their sincere belief in the war. The appellate court stressed that in both cases the defendants "must answer for their acts" to avoid a breakdown in law and order.[15]

At times, lawyers will attempt to indirectly introduce motive by arguing for **jury nullification**. The jury historically has possessed the authority to disregard the law and to acquit sympathetic defendants. This power is based on the jury's historical role as a check on overzealous prosecutors who bring charges that are contrary to prevailing social values. Examples include the acquittal of newspaper publisher Peter Zenger by an eighteenth-century American colonial jury and the acquittal of individuals who assisted fugitive slaves during the nineteenth century. Appellate courts, however, have consistently ruled that trial judges are not obligated to instruct jurors that they possess the power of nullification and that jurors are to be instructed that they are required to strictly apply the law in determining a defendant's guilt. The District of Columbia Circuit Court of Appeals observed that "what is tolerable or even desirable as an informal, self-initiated exception, harbors grave dangers to the system if it is opened to expansion and intensification through incorporation in the judge's instructions." Do you agree?[16]

Self-Defense

It is commonly observed that the United States is a "government of law rather than men and women." This means that guilt and punishment are to be determined in accordance with fair and objective legal procedures in the judicial suites rather than by brute force in the streets. Accordingly, the law generally discourages individuals from "taking the law into their own hands." This type of "vigilante justice" risks anarchy and mob violence. One sorry example is the lynching of thousands of African Americans by the Ku Klux Kan following the Civil War.

For a deeper look at this topic, visit the study site.

Self-defense is the most obvious exception to this rule and is recognized as a defense in all fifty states. Why does the law concede that an individual may use physical force in self-defense? One federal court judge noted the practical consideration that absent this defense, the innocent victim of a violent attack would be placed in the unacceptable position of choosing between "almost certain death" at the hands of his or her attacker or a "trial and conviction of murder later." More fundamentally, eighteenth-century English jurist William Blackstone wrote that it was "lawful" for an individual who is attacked to "repel force by force." According to Blackstone, this was a recognition of the natural impulse and right of individuals to defend themselves. A failure to recognize this right would inevitably lead to a disregard of the law.[17]

The Central Components of Self-Defense

The common law recognizes that an individual is justified in employing force in self-defense. This may involve deadly or nondeadly force, depending on the nature of the threat. There are a number of points to keep in mind:

- *Reasonable Belief.* An individual must possess a reasonable belief that force is required to defend himself or herself. In other words, the individual must believe and a reasonable person must believe that force is required in self-defense.
- *Necessity.* The defender must reasonably believe that force is required to prevent the imminent and unlawful infliction of death or serious bodily harm.
- *Proportionality.* The force employed must not be excessive or more than is required under the circumstances.
- *Retreat.* A defendant may not resort to deadly force if he or she can safely **retreat**. This generally is not required when the attack occurs in the home or workplace, or if the attacker uses deadly force.
- *Aggressor.* An **aggressor**, or individual who unlawfully initiates force, generally is not entitled to self-defense. An aggressor may only claim self-defense in those instances that an aggressor who is not employing deadly force is himself or herself confronted by deadly force. Some courts require that under these circumstances, the aggressor withdraws from the conflict if at all possible before enjoying the right of self-defense. There are courts willing to recognize that even an aggressor who employs deadly force may regain the right of self-defense by withdrawing following the initial attack. The other party then assumes the role of the aggressor.

- *Mistake.* An individual who is mistaken concerning the necessity for self-defense may rely on the defense so long as his or her belief is reasonable.
- *Imperfect Self-Defense.* An individual who honestly, but unreasonably, believes that he or she confronts a situation calling for self-defense and intentionally kills is held liable in many states for an intentional killing. Other states, however, follow the doctrine of **imperfect self-defense**. This provides that although the defendant may not be acquitted, fairness dictates that he or she should be held liable only for the less serious crime of manslaughter.

The next two cases in this chapter, *State v. Habermann* and *State v. Marshall,* provide a review of the basic principles and application of the law of self-defense. These two selections illustrate the core components and challenges of self-defense.

The Statutory Standard

Note the stress on reasonable belief, proportionality, imminence, retreat, and forcible felony in the Utah self-defense statute.

Utah Code Annotated Section 76–2-402. Force in Defense of Person—Forcible Felony Defined

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) A person is not justified in using force . . . if he or she . . .

(a)(i) was the aggressor or was engaged in combat by agreement unless he withdraws from the encounter and effectively communicates to the other person his intent to do so and notwithstanding, the other person continues or threatens to continue the use of unlawful force. . . .

(3) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault . . . [and] any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury. . . .

Model Penal Code

Section 3.04. Use of Force in Self-Protection

(1) [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

(a) . . .

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

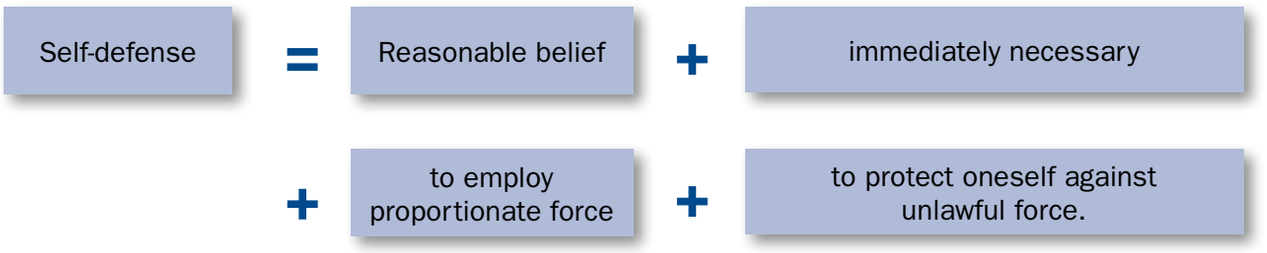
(i) the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take. . . .

Analysis

The Model Penal Code makes some significant modifications to the standard approach to self-defense that will be discussed later in the text. The basic formulation affirms that the use of force in self-protection is justified in those instances in which an individual "employs it in the belief that it is immediately necessary for the purpose of protecting himself against the other's use of unlawful force on the present occasion." The code provides that an aggressor who uses deadly force may "break off the struggle" and retreat and regain the privilege of self-defense against the other party.

The Legal Equation



Did the defendant use his knife in self-defense?

State v. Habermann, *93 S.W.3D 835 (MO. CT. APP. 2002),* Opinion by: Sullivan, J.

Shane Habermann (Appellant) appeals from the judgment of the trial court entered upon a jury verdict convicting him of . . . second-degree assault. . . . [W]e reverse and remand.

Issue

A jury trial was held. The trial court refused to submit a self-defense instruction to the jury on behalf of Appellant, finding that there was insufficient evidence to support such a defense. The jury found Appellant guilty of second-degree assault. Appellant appeals from the judgment of the trial court entered upon that jury verdict . . . and asserts that the evidence provided a basis under which a jury might reasonably have concluded that Appellant's actions which resulted in Costa's injuries were taken in self-defense and acquitted Appellant. . . .

Facts

A large patron from whom Appellant had requested a cigarette in the parking lot approached him and became loud and aggressive. Appellant responded in kind. The two threw punches at each other. People in the crowd that had gathered became involved in the fight. The crowd shouted and swore at Appellant. Appellant thought the crowd would jump him and severely beat him. Appellant began bouncing up and down, trying to locate his friends, who had gone off in search of women. Appellant is 5'8" tall and weighs between 150–160 lbs., and had seen crowds beating people in bar fights before with grave consequences.

As Appellant hopped and circled around, someone, he does not know who, hit him on the head. Then someone threw him to the ground. Someone hit or kicked Appellant in the head while he was on the ground. Someone was on top of Appellant, and Appellant tried to hit this person but his efforts were ineffective in getting the person off of him. At this point, Appellant reached into his pocket, grabbed his knife, and swung it to get the person off of him. Appellant believed his friends had left and he was going to get seriously hurt.

This person at whom Appellant swung the knife was Costa. In swinging the knife, Appellant slashed Costa's throat.

Reasoning

In order to claim self-defense, the defendant (a) must not have provoked or been the aggressor in the assault; (b) must have reasonable grounds for the belief that he is faced with immediate danger of serious bodily injury; (c) must not use more force than that which appears reasonably necessary; and (d) must do everything in his power consistent with his own safety to avoid the danger and must retreat if retreat is practicable. . . .

We believe this incident is separate from the one between Appellant and the larger anonymous patron. Appellant presents evidence that he was not the initial aggressor in this attack upon him by Costa, the credibility of which is up to the jury to determine.

Furthermore, we find that Appellant presents evidence that he tried to escape from this alleged attack by hitting the person in order to get him off him. Because this was not successful, and Appellant feared serious bodily harm in that the crowd was shouting at him and he had seen bar fights before with serious consequences, he pulled out his knife to get the person off of him.

Holding

We find that there is substantial evidence to support the giving of a self-defense instruction. Considering Appellant's version of the events resulting in Costa's injury, there are questions of fact for the jury as to whether Appellant was the initial aggressor in the altercation between Costa and himself, and whether Appellant did everything in his power consistent with his own safety to avoid the danger and/or retreat. Accordingly . . . the judgment of the trial court is reversed and remanded with instructions to proceed in accordance with this opinion.

Questions for Discussion

1. Did Habermann meet all the requirements for a claim of self-defense? What was the significance of Habermann's height, weight, and observation of bar fights?
2. Should the jury acquit Habermann on the grounds of justified self-defense or reject Habermann's plea of self-defense and convict him of assault?

Did the defendant confront an imminent attack?

State v. Marshall, *179 S.E.427 (N.C. 1935), Opinion by: Stacy, C.J.*

Facts

The homicide occurred in the defendant's filling station. The deceased had been drinking, and, with imbecilic courtesy, undertook to engage the defendant's wife in a whispered conversation. This was repulsed and the deceased ordered to leave the building. The defendant testified: "I ordered him out two or three times; he would not leave; and the next thing he said you G—d—s—o—b—and b—; pulled off his hat and slammed it on the counter with his right hand and said you haven't got the guts to shoot me, and that he would die like a man; and when he reached to pick up the hammer in the other hand, I fired. . . . I fired because I thought he was going to kill me with the hammer, or hit me with the hammer and kill me, maybe. He cursed me; I got the pistol and ordered him out, . . . I was scared of the man. No, I was not mad. . . . When I shot him there was the width of the counter between us. We were between 2 1/2 and 3 1/2 feet apart. . . . I did not shoot to kill. . . . I saw him when he grabbed the hammer. I did not say he picked it up, but he grabbed it; he raised the hammer up when he fell back, but he did not have it in a striking position; he was reaching and he grabbed the hammer. I do not say he raised it up in a striking position before I shot. . . . I say he did not draw the hammer back to strike." Defendant's wife testified: "When Rex shot I saw him (deceased) grab for the hammer."

Issue

It appears, therefore, from the defendant's own testimony that he was not in imminent danger of death or great bodily harm when he shot the deceased; nor did he apprehend that he was in such danger. "I did not shoot to kill" is his statement, and it appears from the record that the deceased did not reach for the hammer until after he was shot. The clear inference is that the defendant used excessive force.

Reasoning

The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent . . . [O]ne may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. . . . [O]ne may kill in defense of himself, or his family, when not

actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. . . . [T]he jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted. It is also established by the decisions that in the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be employed, the party charged will be guilty of manslaughter, at least. . . .

Holding

The defendant's conviction for manslaughter is affirmed.

Questions for Discussion

1. Was Marshall motivated by self-defense or by a desire to punish the deceased? Did Marshall have a reasonable basis for believing that the deceased planned to assault him? At what point would the defendant be justified in using his firearm? Should he wait until the trespasser was clearly ready to strike?
2. What force was Marshall justified in utilizing under the circumstances?
3. Marshall was considered to have engaged in imperfect self-defense and was convicted of manslaughter. Explain the reasoning behind the verdict.

You Decide

8.1 Defendant Roberta Shaffer was separated from her husband and lived with her two children. Her boyfriend, to whom she was engaged, had lived in the house for roughly two years. He had beaten Shaffer on several occasions, and when she asked him to move out, he threatened to kill Shaffer and her children. She claimed that she loved her boyfriend and had urged him to seek psychiatric assistance. Shaffer and her boyfriend argued at breakfast one morning and he allegedly angrily responded that "I'll take care of you right now." The defendant threw a cup of coffee at him and ran to the basement where her children were playing. Shaffer's boyfriend allegedly opened the door at the top of the basement stairs and proclaimed that "If you don't come up these stairs, I'll come down and kill you and the kids." She started to telephone the police and hung up when her boyfriend said that he would leave the house. He soon thereafter reappeared at the top of the stairs, and the defendant, who was fairly experienced in the use of firearms, removed a .22-caliber rifle from the gun rack and loaded the gun. Her boyfriend descended two or three stairs when the defendant shot and killed him with a single shot. Five minutes elapsed from the time she fled to the basement to the firing of the fatal shot. Was this an act of justified self-defense in response to imminent threat? Did Shaffer employ proportionate force? Was this imperfect self-defense? Was Shaffer required to retreat inside her own home? See *Commonwealth v. Shaffer,* 326 N.E.2d 880 (Mass. 1975).

You can find the answer at www.sagepub.com/lippmanccl2e

Reasonable Belief

The common law and most statutes and modern decisions require that an individual who relies on self-defense must act with a reasonable belief in the imminence of serious bodily harm or death. The Utah statute on self-defense specifies that a person is justified in threatening or using force against another in those instances in which he or she "reasonably believes that force is necessary . . . to prevent death or serious bodily injury." . . . The reasonableness test has two prongs:

- *Subjective.* A defendant must demonstrate an honest belief that he or she confronted an imminent attack.
- *Objective.* A defendant must demonstrate that a reasonable person under the same circumstances would have believed that he or she confronted an imminent attack.

An individual who acts with an honest and reasonable, but mistaken, belief that he or she is subject to an armed attack is entitled to the justification of self-defense. The classic example is the individual who kills an assailant who is about to stab him or her with a knife, a knife that later is revealed to be a realistic-looking rubber replica. As noted by Supreme Court Justice Oliver Wendell Holmes, "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[18] Absent a reasonableness requirement, it is feared that individuals might act on the basis of suspicion or prejudice or intentionally kill or maim and then later claim self-defense.

The Model Penal Code adopts a subjective approach and only requires that a defendant actually believe in the necessity of self-defense. The subjective approach has been adopted by very few courts. An interesting justification for this approach was articulated by the Colorado Supreme Court, which contended that the reasonable person standard was "misleading and confusing." The right to self-defense, according to the Colorado court, is a "natural right and is based on the natural law of self-preservation. Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the 'reasonable man' concept."[19]

A number of courts are moving to a limited extent in the direction of the Model Penal Code by providing that a defendant acting in an honest, but unreasonable belief, is entitled to claim *imperfect self-defense* and should be convicted of negligent manslaughter rather than intentional murder.[20] In *Harshaw v. State,* the defendant and deceased were arguing and the deceased threatened to retrieve his gun. They both retreated to their automobiles and the defendant grabbed his shotgun in time to shoot the deceased as he reached inside his automobile. The deceased was later found to have been unarmed. The Arkansas Supreme Court ruled that the judge should have instructed the jury on manslaughter because the jurors could reasonably have found that Harshaw acted "hastily and without due care" and that he merited a conviction for manslaughter rather than murder.[21]

The New York Court of Appeals wrestled with the meaning of "reasonableness" under the New York statute in the famous "subway murder trial" of Bernard Goetz. Did the law require a subjective standard in which the existence of the threat was "reasonable to the defendant" or an objective standard in which the existence of the threat was "reasonable to a reasonable person"? What is the best test in terms of the interests of society?

Did Goetz reasonably believe that he was threatened with death or great bodily harm?

People v. Goetz, *497 N.E.2D 41 (N.Y. 1986),* Opinion by: Wachtler, C.J.

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5. The lower courts, concluding that prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

Issue

Is the defense of self-defense based on a subjective standard or a reasonableness under the circumstances, objective standard?

Facts

We have summarized the facts as they appear from the evidence before the Grand Jury. . . .

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in The Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed towards Chambers Street.

It appears from the evidence before the Grand Jury that Canty approached Goetz, possibly with Allen beside him, and stated "give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the shots were fired. The conductor, who had been in the next car, heard the shots and instructed the motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the

injured youths lying on the floor or slumped against a seat, and two women who had apparently taken cover, also lying on the floor. Goetz told the conductor that the four youths had tried to rob him.

While the conductor was aiding the youths, Goetz headed towards the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks and fled. Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed, and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire, identifying himself as the gunman being sought for the subway shootings in New York nine days earlier. Later that day, after receiving Miranda warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked "how are you," to which he replied "fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car. Canty then said "give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder [the four youths], to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot "tried to run through the crowd [but] they had nowhere to run." Goetz then turned to his right to "go after the other two." One of these two "tried to run through the wall of the train, but . . . he had . . . nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]" by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said '[y]ou seem to be all right, here's another,'" and he then fired the shot which severed Cabey's spinal cord. Goetz added that "if I was a little more under self-control . . . I would have put the barrel against his forehead and fired." He also admitted that "if I had had more [bullets], I would have shot them again, and again, and again."

After waiving extradition, Goetz was brought back to New York and arraigned on a felony complaint charging him with attempted murder and criminal possession of a weapon. The matter was presented to a Grand Jury in January 1985, with the prosecutor seeking an indictment for attempted . . . murder, assault, reckless endangerment, and criminal possession of a weapon. . . . On January 25, 1985, the Grand Jury indicted defendant on one count of criminal possession of a weapon in the third degree . . . for possessing the gun used in the subway shootings, and two counts of criminal possession of a weapon in the fourth degree . . . for possessing two other guns in his apartment building. It dismissed, however, the attempted murder and other charges stemming from the shootings themselves.

Several weeks after the Grand Jury's action, the People, asserting that they had newly available evidence, moved for an order authorizing them to resubmit the dismissed charges to a second Grand Jury. . . . On March 27, 1985, the second Grand Jury filed a ten-count indictment, containing four charges of attempted murder . . . four charges of assault in the first degree . . . one charge of reckless endangerment in the first degree . . . and one charge of criminal possession of a weapon in the second degree (possession of loaded firearm with intent to use it unlawfully against another). . . .

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment alleging, among other things, that the evidence before the second Grand Jury was not legally sufficient to establish the offenses charged . . . and that the prosecutor's instructions to that Grand Jury on the defense of justification were erroneous and prejudicial to the defendant so as to render its proceedings defective. . . .

On November 25, 1985, while the motion to dismiss was pending before Criminal Term, a column appeared in the New York Daily News containing an interview which the columnist had conducted with Darryl Cabey the previous day in Cabey's hospital room. The columnist claimed that Cabey had told him in this interview that the other three youths had all approached Goetz with the intention of robbing him. The day after the column was published, a New York City police officer informed the prosecutor that he had been one of the first police officers to enter the subway car after the shootings, and that Canty had said to him "we were going to rob [Goetz]." . . .

In an order dated January 21, 1986, the Supreme Court . . . granted Goetz's motion to the extent that it dismissed all counts of the second indictment, other than the reckless endangerment charge, with leave to resubmit these charges to a third Grand Jury. The court, after inspection of the Grand Jury minutes . . . held . . . that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an

objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation." The court . . . concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case.

On appeal by the People, a divided Appellate Division . . . affirmed Criminal Term's dismissal of the charges. The plurality opinion by Justice Kassal, concurred in by Justice Carro, agreed with Criminal Term's reasoning on the justification issue, stating that the grand jurors should have been instructed to consider only the defendant's subjective beliefs as to the need to use deadly force. . . . We agree with the dissenters that neither the prosecutor's charge to the Grand Jury on justification nor the information which came to light while the motion to dismiss was pending required dismissal of any of the charges in the . . . indictment.

Reasoning

New York Penal Law (NYPL) section 35 recognizes the defense of justification, which "permits the use of force under certain circumstances." . . . One such set of circumstances pertains to the use of force in defense of a person, encompassing both self-defense and defense of a third person. New York Penal Law section 35.15(1) sets forth the general principles governing all such uses of force: "[a] person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person." Subdivision (1) contains certain exceptions to this general authorization to use force, such as where the actor himself was the initial aggressor. Subdivision (2) sets forth further limitations on these general principles with respect to the use of deadly physical force and provides that a person may not use deadly physical force under circumstances specified in subdivision one unless: "(a) He reasonably believes that such other person is using or about to use deadly physical force . . . or (b) He reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery." Section 35.15(2)(a) also provides that even under these circumstances a person ordinarily must retreat "if he knows that he can with complete safety as to himself and others avoid the necessity of [using deadly physical force] by retreating."

Thus, consistent with most justification provisions, NYPL section 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met. As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery. As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat.

Holding

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in NYPL section 35.15 to the Grand Jury. . . . The prosecutor properly instructed the grand jurors to consider whether the use of deadly physical force was justified to prevent either serious physical injury or a robbery, and, in doing so, to separately analyze the defense with respect to each of the charges. . . .

When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes." The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation." It is this response by the prosecutor—and specifically his use of "a reasonable man"—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because NYPL section 35.15 uses the term "he reasonably believes," the appropriate test, according to that court, is whether a defendant's beliefs and reactions were "reasonable to him." Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature, in enacting NYPL section 35.15, to retain an objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense. . . . These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of reasonableness.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use

of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. The plurality's interpretation, as the dissenters recognized, excises the impact of the word "reasonably." . . . [W]e have frequently noted that a determination of reasonableness must be based on the "circumstance" facing a defendant or his "situation." . . .Such terms encompass more than the physical movements of the potential assailant. As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances. . . . Accordingly, the order of the Appellate Division should be reversed, and the dismissed counts of the indictment reinstated.

Questions for Discussion

1. Goetz was acquitted of attempted murder and assault. He was found to have been justified in shooting the four young men in the subway car. Goetz was convicted of unlawful possession of a firearm and was sentenced to one year in prison. He was released after eight months in jail. The jury was composed of eight men and four women, ten whites and two African Americans. Do you agree that Goetz acted in self-defense? In 1996, a six-member civil jury ordered Goetz to pay $18 million in compensatory damages and $25 million in punitive damages. The Goetz case is discussed in George P. Fletcher's *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York: The Free Press, 1988).
2. Would problems arise in the event that the law of self-defense was based on a purely subjective test? Are there arguments in support of this approach? In most cases, would it matter whether a jury applied an objective or subjective test?
3. What circumstances should the jury consider in determining the reasonableness of Goetz's actions? Should Goetz's past experiences be considered? The fact that the shooting occurred in the subway? The physical size, age, dress, and behavior of the young males? What about the fact that Ramseur and Cabey had screwdrivers?
4. A number of commentators contend that any explanation of the verdict in the Goetz case must consider the race of the individuals involved. Goetz was Caucasian, while the four young people were African American. Professor George Fletcher raises the issue whether the same verdict would have been returned had Goetz been an African American and his attackers Caucasian juveniles. What is your opinion? Did Goetz stereotype the young men and assume that he was about to be robbed? Was his response based on revenge or self-defense? What would your reaction have been in the event that you found yourself in Goetz's position?

Cases and Comments

1. ***Objectivity, Subjectivity, and Reasonableness.*** Defendant Anthony Simon, described as an elderly homeowner in Wichita, Kansas, lived next door to Steffen Wong. The Kansas Supreme Court notes that by "virtue of Mr. Wong's racial heritage that the defendant assumed he was an expert in martial arts." The defendant exchanged "heated words with Wong" and expressed anxiety over other Asian Americans moving into the neighborhood. Simon's anger boiled over when he fired a firearm at Wong and another resident as they pulled into their driveway. He then fired at the police who arrived on the scene. The defense called an expert witness who testified that the defendant suffered from an "anxiety neurosis" that caused him to be fearful and to "misjudge reality." The jury was instructed that the question was whether Simon's actions were "reasonable to him under the circumstances then existing" and acquitted the defendant. The Kansas Supreme Court reversed, ruling that the trial court improperly employed a subjective standard and that the objective standard required the "existence of facts that would persuade a reasonable man to that belief." Is this similar to *Goetz?* See *Simon v. State,* 646 P.2d 1119 (Kan. 1982).

2. ***The Reasonable Woman.*** Defendant Yvonne Wanrow was convicted of murder and assault. Her conviction was reversed by the Washington Supreme Court. William Wesler was accused of molestation by Ms. Hooper's children. Hooper's landlord shared that Wesler had earlier attempted to molest a young child who had previously lived in Hooper's house and that Wesler had been committed to a mental asylum; the landlord advised Ms. Hooper that she should arm herself with a baseball bat. Yvonne Wanrow's two children were staying with Hooper at the time, and the two women and several other adults agreed to spend the night together to provide mutual support and security against possible retaliation by Wesler. Two of the men staying with Hooper visited Wesler and persuaded him to accompany them to Hooper's house to discuss the allegations. This led to a noisy and high-pitched verbal exchange. At one point, Wesler provocatively approached a young child sleeping on the couch and Hooper screamed for Wesler to leave her home. Ms. Wanrow, who was five foot four inches in height, had a broken leg, and was using a crutch, had placed a pistol in her purse. She testified that she turned

around and found herself confronting the six-foot, two-inch Wesler and that she shot him as a reflex response.

The Washington Supreme Court determined that the judge's self-defense instructions to the jury were deficient, and that although the jury was instructed to consider the relative size and strength of the persons involved, they should also have been instructed to "afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination." The jury had been directed to evaluate the defendant's conduct in accordance with the reactions of a "reasonably and ordinarily cautious and prudent man." The Washington Supreme Court explained that women suffer from a lack of training in the skills required to "effectively repeal a male assailant without resorting to the use of deadly weapons" and that the jury instructions should have directed the jury to consider the defendant's gender. The court also ruled that the trial court had properly declined to permit the defendant to rely on an expert witness to present evidence on the effects of the defendant's Indian culture on her perception and actions. Should juries be instructed to consider the reasonableness of a defendant's actions in light of his or her gender? What else should the jury be instructed to consider? See *State v. Wanrow,* 559 P.2d 548 (Wash. 1977).

You Decide

8.2 A group of five young Latino men were crossing the street when a car speeding around the corner suddenly braked to permit the young men to cross the street. Some of the young men, including the defendant, yelled at the driver to slow down. The driver, Alex Bernal, responded that he was looking for his daughter and that they should move out of the way. Bernal pulled the car to the side of the road and the defendant approached the passenger side of the car. Heated words were exchanged and Bernal exited the auto, removed his shoes, and began kicking into the air without hitting anyone. At some point during the ensuing exchange, Bernal appears to have swung at the defendant and the defendant responded by thrusting a knife into Bernal's heart. Bernal later died; the autopsy indicated that he had been stabbed three times. The defendant testified that he only intended to scare the unarmed Bernal and stab him in the leg, and that he was motivated by a desire to protect his brother from possible injury. The trial court ruled that the testimony of expert witness and sociologist Professor Martin Sanchez Jankowski was irrelevant and inadmissible. Professor Jankowski would have testified that (1) street fighters in the Hispanic culture do not retreat; (2) the Hispanic culture is based on honor; and (3) the defendant's testimony indicates that he was concerned with protecting his younger brother. Should the California Court of Appeal reverse the defendant's conviction because of the failure of the trial court judge to permit the jury to hear Professor Jankowski's testimony? See *People v. Romero,* 81 Cal. Rptr. 2d 823 (Cal. Ct. App. 1999).

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Imminence

A defendant must reasonably believe that the threatened harm is imminent, meaning that the harm "is about to happen." The requirement that the defendant act out of necessity is based on several considerations:

- *Resolution of Disputes.* The law encourages the peaceful resolution of disputes where possible.
- *Last Resort.* Individuals should only resort to self-help where strictly required.
- *Evidence.* The existence of a clear and measurable threat provides confidence that the defendant is acting out of self-defense rather than out of a desire to punish the assailant or to seek revenge. Also, the existence of a clear threat assists in determining whether there is proportionality between the threatened harm and defensive response.

In *State v. Schroeder,* the nineteen-year-old defendant stabbed a violent cellmate who threatened to make Schroeder his "sex slave" or "punk." Schroeder testified that he felt vulnerable and afraid and woke up at 1:00 A.M. and stabbed his cellmate in the back with a table knife and hit him in the face with a metal ashtray. The Nebraska Supreme Court ruled that the threatened harm was not imminent and that there was a danger in legalizing "preventive assaults."[22]

Some courts have not insisted on a strict imminence standard. An Illinois case, for instance, ruled that a cab driver acted in self-defense in shooting and killing an individual who, along with other gang members, was involved in beating up an elderly man. The assailants threw a brick at the cab in retaliation for the driver's yelling at the gang and allegedly started to move toward the

taxi. The Illinois Supreme Court concluded that the attackers possessed the capacity and intent to attack the driver, who was carrying money and was aware that a number of drivers recently had been attacked. On the other hand, consider the fact that the driver could have fled, shot over the heads of the assailants, or waited until the young people presented a more immediate threat.[23]

The Model Penal Code adopts this type of broad approach and provides that force is justifiable when the actor believes that he or she will be attacked on "the present occasion" rather than imminently. The commentary to the Model Penal Code notes that this standard would permit individuals to employ force in self-defense to prevent an individual who poses a threat from summoning reinforcements. The broad Model Penal Code test has found support in the statutes of a number of states, including Delaware, Hawaii, Nebraska, New Jersey, and Pennsylvania. A dissenting judge in *Schroeder* cited the Model Penal Code and argued that the young inmate should have been acquitted on the grounds of self-defense. After all, he could not be expected to remain continuously on guard against an assault by his older cellmate or the cellmate's friends.

The clash between the common law imminence requirement and the Model Penal Code's notion that self-defense may be justified where necessary to prevent an anticipated harm is starkly presented in cases in which defendants invoke the so-called battered spouse defense. In *State v. Norman,* the next case in the chapter, a woman who has been the victim of continual battering by her husband over a number of years kills her abusive spouse while he is sleeping. In reading this case, consider whether we should broadly interpret the imminence standard and, if not, what standard should be adopted.

Did Norman confront an imminent threat from her abusive husband?

State v. Norman, *366 S.E.2D 586 (N.C. CT. APP. 1988),* Opinion by: Parker, J.

The primary issue presented on this appeal is whether the trial court erred in failing to instruct on self-defense. We answer in the affirmative and grant a new trial.

Facts

At trial the State presented the testimony of a deputy sheriff of the Rutherford County Sheriff's Department who testified that on 12 June 1985, at approximately 7:30 P.M., he was dispatched to the Norman residence. There, in one of the bedrooms, he found decedent, John Thomas "J.T." Norman (herein decedent or Norman) dead, lying on his left side on a bed. The State presented an autopsy report, stipulated to by both parties, concluding that Norman had died from two gunshot wounds to the head. . . .

Defendant and Norman had been married twenty-five years at the time of Norman's death. Norman was an alcoholic. He had begun to drink and to beat defendant five years after they were married. The couple had five children, four of whom are still living. When defendant was pregnant with her youngest child, Norman beat her and kicked her down a flight of steps, causing the baby to be born prematurely the next day.

Norman, himself, had worked one day a few months prior to his death; but aside from that one day, witnesses could not remember his ever working. Over the years and up to the time of his death, Norman forced defendant to prostitute herself every day in order to support him. If she begged him not to make her go, he slapped her. Norman required defendant to make a minimum of one hundred dollars per day; if she failed to make this minimum, he would beat her.

Norman commonly called defendant "Dog," "Bitch," and "Whore," and referred to her as a dog. Norman beat defendant "most every day," especially when he was drunk and when other people were around, to "show off." He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. . . . Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.

Norman often stated both to defendant and to others that he would kill defendant. He also threatened to cut her heart out.

On or about the morning of 10 June 1985, Norman forced defendant to go to a truck stop or rest stop on Interstate 85 in order to prostitute to make some money. Defendant's daughter and defendant's daughter's boy friend accompanied defendant. Some time later that day, Norman went to the truck stop, apparently drunk, and began hitting defendant in the face with his fist and slamming the car door into her. He also threw hot coffee on defendant. . . .

On 11 June 1985, Norman was extremely angry and beat defendant. . . . Defendant testified that during the entire day, when she was near him, her husband slapped her, and when she was away from him, he threw glasses, ashtrays, and beer bottles at her. Norman asked defendant to make him a sandwich; when defendant brought it to him, he threw it on the floor and told her to make him another. Defendant made him a second sandwich and brought it to him; Norman again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. Defendant made a third sandwich using a paper towel to handle the bread. Norman took the third sandwich and smeared it in defendant's face.

On the evening of 11 June 1985, at about 8:00 or 8:30, a domestic quarrel was reported at the Norman residence. The officer responding to the call testified that defendant was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer. The officer advised defendant to take out a warrant on her husband, but defendant responded that if she did so, he would kill her. A short time later, the officer was again dispatched to the Norman residence. There he learned that defendant had taken an overdose of "nerve pills," and that Norman was interfering with emergency personnel who were trying to treat defendant. Norman was drunk and was making statements such as, "If you want to die, you deserve to die. I'll give you more pills," and "Let the bitch die. . . . She ain't nothing but a dog. She don't deserve to live." Norman also threatened to kill defendant, defendant's mother, and defendant's grandmother. The law enforcement officer reached for his flashlight or blackjack and chased Norman into the house. Defendant was taken to Rutherford Hospital. . . .

The next day, 12 June 1985, the day of Norman's death . . . Defendant was driving. During the ride . . . Norman slapped defendant for following a truck too closely and poured a beer on her head. Norman kicked defendant in the side of the head while she was driving and told her he would "cut her breast off and shove it up her rear end."

. . . Witnesses stated that back at the Norman residence, Norman threatened to cut defendant's throat, threatened to kill her, and threatened to cut off her breast. Norman also smashed a doughnut on defendant's face and put out a cigarette on her chest.

In the late afternoon, Norman wanted to take a nap. He lay down on the larger of the two beds in the bedroom. Defendant started to lie down on the smaller bed, but Norman said, "No bitch . . . Dogs don't sleep on beds, they sleep in [*sic*] the floor." Soon after, one of the Normans' daughters, Phyllis, came into the room and asked if defendant could look after her baby. Norman assented. When the baby began to cry, defendant took the child to her mother's house, fearful that the baby would disturb Norman. At her mother's house, defendant found a gun. She took it back to her home and shot Norman.

Defendant testified that things at home were so bad she could no longer stand it. She explained that she could not leave Norman because he would kill her. She stated that she had left him before on several occasions and that each time he found her, took her home, and beat her. She said that she was afraid to take out a warrant on her husband because he had said that if she ever had him locked up, he would kill her when he got out. She stated she did not have him committed because he told her he would see the authorities coming for him and before they got to him he would cut defendant's throat. Defendant also testified that when he threatened to kill her, she believed he would kill her if he had the chance.

The defense presented the testimony of two expert witnesses in the field of forensic psychology. . . . Dr. Tyson concluded that defendant "fits and exceeds the profile, of an abused or battered spouse." . . . Dr. Tyson stated that defendant could not leave her husband because she had gotten to the point where she had no belief whatsoever in herself and believed in the total invulnerability of her husband. He stated, "Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. . . . When asked if it appeared to defendant reasonably necessary to kill her husband, Dr. Tyson responded, "I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family." . . .

Issue

The State contends that because decedent was asleep at the time of the shooting, defendant's belief in the necessity to kill decedent was, as a matter of law, unreasonable. The State further contends that even assuming . . . the evidence satisfied the requirement that defendant's belief be reasonable, defendant, being the aggressor, cannot satisfy the third requirement of perfect self-defense. . . . The question then arising on the facts in this case is whether the victim's passiveness at the moment the unlawful act occurred precludes defendant from asserting perfect self-defense.

Reasoning

Applying the criteria of **perfect self-defense** to the facts of this case, we hold that the evidence was sufficient to submit an issue of perfect self-defense to the jury. An examination of the elements of perfect self-defense reveals that both subjective and objective standards are to be applied in making the crucial determinations. The first requirement that it appear to defendant and that defendant believe it necessary to kill the deceased in order to save herself from death or great bodily harm calls for a subjective evaluation. This evaluation inquires as to what the defendant herself perceived at the time of the shooting. The trial was replete with testimony of forced prostitution, beatings, and threats on defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from Norman, he had come after her and beat her. Indeed, within twenty-four

hours prior to the shooting, defendant had attempted to escape by taking her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. Experts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. . . .

Unlike the first requirement, the second element of self-defense—that defendant's belief be reasonable in that the circumstances as they appeared to defendant would be sufficient to create such a belief in the mind of a person of ordinary firmness—is measured by the objective standard of the person of ordinary firmness under the same circumstances. Again, the record is replete with sufficient evidence to permit but not compel a juror, representing the person of ordinary firmness, to infer that defendant's belief was reasonable under the circumstances in which she found herself. Expert witnesses testified that defendant exhibited severe symptoms of battered spouse syndrome, a condition that develops from repeated cycles of violence by the victim against the defendant. Through this repeated, sometimes constant, abuse, the battered spouse acquires what the psychologists denote as a state of "learned helplessness," defendant's state of mind as described by Drs. Tyson and Rollins. . . . In the instant case, decedent's excessive anger, his constant beating and battering of defendant on 12 June 1985, her fear that the beatings would resume, as well as previous efforts by defendant to extricate herself from this abuse are circumstances to be considered in judging the reasonableness of defendant's belief that she would be seriously injured or killed at the time the criminal act was committed. The evidence discloses that defendant felt helpless to extricate herself from this intolerable, dehumanizing, brutal existence. Just the night before the shooting, defendant had told the sheriff's deputy that she was afraid to swear out a warrant against her husband because he had threatened to kill her when he was released if she did. The inability of a defendant to withdraw from the hostile situation and the vulnerability of a defendant to the victim are factors considered by our Supreme Court in determining the reasonableness of a defendant's belief in the necessity to kill the victim. . . .

To satisfy the third requirement, defendant must not have aggressively and willingly entered into the fight without legal excuse or provocation. By definition, aggression in the context of self-defense is tied to provocation. The existence of battered spouse syndrome, in our view, distinguishes this case from the usual situation involving a single confrontation or affray. The provocation necessary to determine whether defendant was the aggressor must be considered in light of the totality of the circumstances. . . .

Holding

Mindful that the law should never casually permit an otherwise unlawful killing of another human being to be justified or excused, this Court is of the opinion that with the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition. This position is in accord with other jurisdictions that have addressed the issue. . . .

In this case, decedent, angrier than usual, had beaten defendant almost continuously during the afternoon and had threatened to maim and kill defendant. . . . A jury, in our view, could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense. The expert testimony considered with the other evidence would permit reasonable minds to infer that defendant did not use more force than reasonably appeared necessary to her under the circumstances to protect herself from death or great bodily harm.

Based on the foregoing analysis, we are of the opinion that, in addition to the instruction on voluntary manslaughter, defendant was entitled to an instruction on perfect self-defense. . . . The jury is to regard evidence of battered spouse syndrome merely as some evidence to be considered along with all other evidence in making its determination whether there is a reasonable doubt as to the unlawfulness of defendant's conduct. . . . New trial.

Questions for Discussion

1. The jury convicted Norman of voluntary manslaughter and, as a result, did not accept that the defendant's killing of her husband was a justified act of perfect self-defense. Summarize the appellate court's reasoning in ruling that the defendant was entitled to have the jury consider her claim of self-defense.
2. What are the dangers of too broad or too narrow a view of the imminence requirement for self-defense? Was the defendant's use of force proportionate to the threat that she confronted from her husband?
3. Does reliance on the "battered spouse syndrome" risk that experts will attribute traits of "helplessness" to the defendant that, in fact, she does not possess?
4. Can men involved in heterosexual or homosexual relationships rely on the "battered spouse syndrome?" Can women rely on it who are involved in homosexual relationships?

Cases and Comments

1. ***The North Carolina Supreme Court.*** The North Carolina Supreme Court reversed the appellate court and ruled that the trial court properly declined to instruct the jury on self-defense. The supreme court ruled that the evidence did not "tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm." The court further observed that the "relaxed requirements" for self-defense would "legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' . . . subjective speculation as the probability of future felonious assaults by their husbands." Do you agree? See *State v. Norman,* 378 S.E.2d 8 (N.C. 1989). An additional case on the right of an abused spouse to rely on self-defense is *State v. Stewart,* 763 P.2d 572 (Kan. 1988).

2. ***Domestic Violence.*** A 2005 study by the World Health Organization of women in ten countries concluded that domestic violence is frighteningly common and is accepted as normal within many societies. The percentage of women reported to have been physically or sexually assaulted in their lifetime ranges from fifteen percent in Japan to seventy-one percent in Ethiopia. In the United States, the Centers for Disease Control and Prevention reports that about 1.5 million women a year are assaulted by a husband or boyfriend. One in six women has been sexually assaulted at some point in her life. The study estimated that the economic cost of domestic violence in America is $5.8 billion a year, including $4.1 billion in medical and counseling costs.

You Decide

8.3 The defendant, seventeen-year-old Andrew Janes, was abandoned by his alcoholic father at age seven. Along with his mother Gale and brother Shawn, Andrew was abused by his mother's lover, Walter Jaloveckas, for roughly ten years. As Walter walked in the door following work on August 30, 1988, Andrew shot and killed him; one 9-millimeter pistol shot went through Walter's right eye and the other through his head. The previous night Walter had yelled at Gale, and Walter later leaned his head into Andrew's room and spoke in low tones that usually were "reserved for threats." Andrew was unable to remember precisely what Walter said. In the morning, Gale mentioned to Andrew that Walter was still mad. After returning from school, Andrew loaded the pistol, drank some whiskey, and smoked marijuana.

Examples of the type of abuse directed against Andrew by Walter included beatings with a belt and wire hanger, hitting Andrew in the mouth with a mop, and punching Andrew in the face for failing to complete a homework assignment. In 1988, Walter hit Andrew with a piece of firewood, knocking him out. Andrew was subject to verbal as well as physical threats, including a threat to nail his hands to a tree, brand his forehead, place Andrew's hands on a hot stove, break Andrew's fingers, and hit him in the head with a hammer.

The "battered child syndrome" results from a pattern of abuse and anxiety. "Battered children" live in a state of constant alert ("hypervigilant"), caution ("hypermonitoring"), and develop a lack of confidence and an inability to seek help ("learned helplessness"). Did Andrew believe and would a reasonable person believe that Andrew confronted an imminent threat of great bodily harm or death? The Washington Supreme Court clarified that imminent means "near at hand . . . hanging threateningly over one's head . . . menacingly near." The trial court refused to instruct the jury to consider whether Andrew was entitled to invoke self-defense. Should the Washington Supreme Court uphold or reverse the decision of the trial court? See *State v. Janes,* 850 P.2d 495 (Wash. 1993).

You can find the answer at www.sagepub.com/lippmanccl2e

Excessive Force

An individual acting in self-defense is entitled to use the force reasonably believed to be necessary to defend himself or herself. **Deadly force** is force that a reasonable person under the circumstances would be aware will cause or create a substantial risk of death or substantial bodily harm. This may be employed to protect against death or serious bodily harm. The application of excessive rather than proportionate force may result in a defender's being transformed into an aggressor. This is the case where an individual entitled to **nondeadly force** resorts to deadly force. The Model Penal Code limits deadly force to the protection against death, serious bodily injury, kidnapping, or rape. The Wisconsin statute authorizes the application of deadly force against arson, robbery, burglary, and any felony offense that creates a danger of death or serious bodily harm.

In *State v. Pranckus,* the Connecticut Appellate Court ruled that the defendant could not have reasonably believed that the use of a kitchen knife with an eight-inch blade was required to defend himself in a fistfight. The defendant charged at the victims and stabbed each of the victims twice, killing one of them. The Connecticut court noted that both victims suffered wounds on their backs, indicating that they were fleeing and that the defendant was sufficiently confident of his ability to defend himself that he later attempted to continue the fight without a weapon.[24]

The requirement of proportionality is not accepted in various foreign countries that stress the privilege of individuals to respond without limitation to an attack. Should there be a restriction on the right of an innocent individual to respond to an attack?[25]

Retreat

The law of self-defense is based on necessity. An individual may resort to self-protection when he or she reasonably believes it necessary to defend against an immediate attack. The amount of force is limited to that reasonably believed to be necessary. Courts have struggled with how to treat a situation in which an individual may avoid resorting to deadly force by safely retreating or fleeing. The principle of necessity dictates that every alternative should be exhausted before an individual resorts to deadly force and that an individual should be required to **retreat to the wall** (as far as possible). On the other hand, should an individual be required to retreat when confronted with a violent wrongdoer? Should the law promote cowardice and penalize courage?

Virtually every jurisdiction provides that there is no duty or requirement to retreat before resorting to *nondeadly force*. A majority of jurisdictions follow the same **stand your ground rule** in the case of *deadly force,* although a "significant minority" require retreat to the wall. The stand your ground rule is also followed in most former communist countries in Europe and is based on several considerations:[26]

- The promotion of a courageous attitude.
- The refusal to protect a wrongdoer initiating an attack.
- The reluctance of courts to complicate their task by being placed in the position of having to rule on various issues surrounding the duty to retreat.
- The retreat rule may endanger individuals who are required to retreat and encourage wrongdoers who have no reason to fear for their lives.

Most jurisdictions limit the right to "stand your ground" when confronted with nondeadly force to an individual who is without fault, a **true man**. An aggressor employing nondeadly force must clearly abandon the struggle and it must be a **withdrawal in good faith** to regain the right of self-defense. Some courts recognize that even an aggressor using deadly force may withdraw and regain the right of self-defense. In these instances, the right of self-defense will limit the initial aggressor's liability to manslaughter and will not provide a *perfect self-defense*. A withdrawal in good faith must be distinguished from a **tactical retreat** in which an individual retreats with the intent of continuing the hostilities.

The requirement of retreat is premised on the traditional rule that only necessary force may be employed in self-defense. The provision for retreat is balanced by the consideration that withdrawal is not required when the safety of the defender would be jeopardized. The **castle doctrine** is another generally recognized exception to the rule of retreat and provides that individuals inside the home are justified in "holding their ground."[27]

The Model Penal Code section 3.04(b)(ii) provides that deadly force is not justifiable in those instances in which an individual "knows that he can avoid the necessity of using such force with complete safety by retreating." There is no duty to retreat under the Model Penal Code within the home or place of work unless an individual is an aggressor.

The next case in the chapter, *United States v. Peterson,* explores the right of an "aggressor" to self-defense, the duty to retreat, and the castle doctrine. Do you agree with the federal court's decision that Peterson is not entitled to claim self-defense?

Was Peterson required to retreat?

UNITED STATES V. PETERSON, *483 F.2D 1222 (D.C. CIR. 1973),* OPINION BY: ROBINSON, J.

Issues

Peterson was indicted for second-degree murder and was convicted by a jury of manslaughter as a lesser included offense. Bennie L. Peterson . . . complains. . . . that the judge twice erred in the instructions given the jury in relation to his claim that the homicide was committed in self-defense. One error alleged was an instruction that the

jury might consider whether Peterson was the aggressor in the altercation that resulted in the homicide. The other was an instruction that a failure by Peterson to retreat, if he could have done so without jeopardizing his safety, might be considered as a circumstance bearing on the question whether he was justified in using the amount of force which he did.

Facts

The events immediately preceding the homicide are not seriously in dispute. The version presented by the Government's evidence follows. Charles Keitt, the deceased, and two friends drove in Keitt's car to the alley in the rear of Peterson's house to remove the windshield wipers from the latter's wrecked car. While Keitt was doing so, Peterson came out of the house. Peterson went back into the house, obtained a pistol, and returned to the yard. In the meantime, Keitt had reseated himself in his car, and he and his companions were about to leave. The car was characterized by some witnesses as "wrecked" and by others as "abandoned." The testimony left it clear that its condition was such that it could not be operated. It was parked on one side of the alley about fifteen feet from the gate in the rear fence which opened into Peterson's back yard. Keitt's car was stopped in the alleyway about four feet behind it. Upon his reappearance in the yard, Peterson paused briefly to load the pistol. "If you move," he shouted to Keitt, "I will shoot." He walked to a point in the yard slightly inside a gate in the rear fence and, pistol in hand, said, "If you come in here I will kill you." Keitt alighted from his car, took a few steps toward Peterson and exclaimed, "What the hell do you think you are going to do with that?" Keitt then made an about-face, walked back to his car and got a lug wrench. With the wrench in a raised position, Keitt advanced toward Peterson, who stood with the pistol pointed toward him. Peterson warned Keitt not to "take another step" and, when Keitt continued onward, shot him in the face from a distance of about ten feet. Death was apparently instantaneous. Shortly thereafter, Peterson left home and was apprehended twenty-odd blocks away. Keitt apparently had been drinking and an autopsy disclosed that he had a .29 percent blood alcohol content. Keitt fell in the alley about seven feet from the gate.

This description of the fatal episode was furnished at Peterson's trial by four witnesses for the Government. Peterson did not testify, but provided a statement to the police in which he related . . . that Keitt had removed objects from his car before, and on the day of the shooting he had told Keitt not to do so. After the initial verbal altercation, Keitt went to his car for the lug wrench, so he, Peterson, went into his house for his pistol. When Keitt was about ten feet away, he pointed the pistol "away of his right shoulder;" adding that Keitt was running toward him, Peterson said he "got scared and fired the gun. He ran right into the bullet." "I did not mean to shoot him," Peterson insisted, "I just wanted to scare him."

At trial, Peterson moved for a judgment of acquittal. The jury returned a verdict finding Peterson guilty of manslaughter. Judgment was entered conformably with the verdict, and this appeal followed.

Reasoning

Peterson's consistent position is that as a matter of law his conviction of manslaughter—alleviated homicide—was wrong and that his act was one of self-preservation—justified homicide. The Government, on the other hand, has contended from the beginning that Keitt's slaying fell outside the bounds of lawful self-defense. The questions remaining for our decision inevitably track back to this basic dispute.

The law of self-defense is a law of necessity . . . the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The "necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable." Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts. So it is that necessity is the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defense. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice. Here the parties' opposing contentions focus on the roles of two further considerations. One is the provoking of the confrontation by the defender. The other is the defender's failure to utilize a safe route for retreat from the confrontation. The essential inquiry, in final analysis, is whether and to what extent the rule of necessity may translate these considerations into additional factors in the equation. To these questions, in the context of the specific issues raised, we now proceed.

The trial judge's charge authorized the jury, as it might be persuaded, to convict Peterson of second-degree murder or manslaughter, or to acquit by reason of self-defense. On the latter phase of the case, the judge instructed that with evidence of self-defense present, the Government bore the burden of proving beyond a reasonable doubt that Peterson did not act in self-defense; and that if the jury had a reasonable doubt as to whether Peterson acted in self-defense, the verdict must be not guilty. The judge further instructed that the circumstances under which Peterson acted, however, must have

been such as to produce a reasonable belief that Keitt was then about to kill him or do him serious bodily harm and that deadly force was necessary to repel him. In determining whether Peterson used excessive force in defending himself, the judge said, the jury could consider all of the circumstances under which he acted.

These features of the charge met Peterson's approval, and we are not summoned to pass on them. There were, however, two other aspects of the charge to which Peterson objected, and which are now the subject of vigorous controversy. The first of Peterson's complaints centers upon an instruction that the right to use deadly force in self-defense is not ordinarily available to one who provokes a conflict or is the aggressor in it. Mere words, the judge explained, do not constitute provocation or aggression; and if Peterson precipitated the altercation but thereafter withdrew from it in good faith and so informed Keitt by words or acts, he was justified in using deadly force to save himself from imminent danger or death or grave bodily harm. And, the judge added, even if Keitt was the aggressor and Peterson was justified in defending himself, he was not entitled to use any greater force than he had reasonable ground to believe and actually believed to be necessary for that purpose. Peterson contends that there was no evidence that he either caused or contributed to the conflict, and that the instructions on that topic could only mislead the jury.

It has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill. The right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. The fact that the deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize the self-defense claim if in fact the claimant was the actual provoker. In sum, one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation. Only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense.

This body of doctrine traces its origin to the fundamental principle that a killing in self-defense is excusable only as a matter of genuine necessity. Quite obviously, a defensive killing is unnecessary if the occasion for it could have been averted, and the roots of that consideration run deep with us. A half-century ago, in *Laney v. United States,* this Court declared that, before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity.

In the case at bar, the trial judge's charge fully comported with these governing principles. The remaining question, then, is whether there was evidence to make them applicable to the case. A recapitulation of the proofs shows beyond peradventure that there was.

It was not until Peterson fetched his pistol and returned to his back yard that his confrontation with Keitt took on a deadly cast. Prior to his trip into the house for the gun, there was, by the Government's evidence, no threat, no display of weapons, no combat. There was an exchange of verbal aspersions and a misdemeanor against Peterson's property was in progress but, at this juncture, nothing more. Even if Peterson's postarrest version of the initial encounter were accepted—his claim that Keitt went for the lug wrench before he armed himself—the events which followed bore heavily on the question as to who the real aggressor was.

The evidence is uncontradicted that when Peterson reappeared in the yard with his pistol, Keitt was about to depart the scene. Richard Hilliard testified that after the first argument, Keitt reentered his car and said "Let's go." This statement was verified by Ricky Gray, who testified that Keitt "got in the car and . . . they were getting ready to go;" he, too, heard Keitt give the direction to start the car. The uncontroverted fact that Keitt was leaving shows plainly that so far as he was concerned the confrontation was ended. It demonstrates just as plainly that even if he had previously been the aggressor, he no longer was.

Not so with Peterson, however, as the undisputed evidence made clear. Emerging from the house with the pistol, he paused in the yard to load it, and to command Keitt not to move. He then walked through the yard to the rear gate and, displaying his pistol, dared Keitt to come in, and threatened to kill him if he did. While there appears to be no fixed rule on the subject, the cases hold, and we agree, that an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense. We cannot escape the abiding conviction that the jury could readily find Peterson's challenge to be a transgression of that character.

The situation at bar is not unlike that presented in *Laney.* There the accused, chased along the street by a mob threatening his life, managed to escape through an areaway between two houses. In the back yard of one of the houses, he checked a gun he was carrying and then returned to the areaway. The mob beset him again, and during an exchange of shots one of its members was killed by a bullet from the accused's gun. In affirming a conviction of manslaughter, the court reasoned that when defendant escaped from the mob into the back yard . . . he was in a place of comparative safety, from which, if he desired to go home, he could have gone by the back way, as he subsequently did. . . . His appearance on the street at that juncture could mean nothing but trouble for him. Hence, when he adjusted his gun and stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble. We think his conduct in adjusting his revolver and going into the areaway was

such as to deprive him of any right to invoke the plea of self-defense.

We think the evidence plainly presented an issue of fact as to whether Peterson's conduct was an invitation to and provocation of the encounter which ended in the fatal shot. We sustain the trial judge's action in remitting that issue for the jury's determination.

The second aspect of the trial judge's charge as to which Peterson asserts error concerned the undisputed fact that at no time did Peterson endeavor to retreat from Keitt's approach with the lug wrench. The judge instructed the jury that if Peterson had reasonable grounds to believe and did believe that he was in imminent danger of death or serious injury, and that deadly force was necessary to repel the danger, he was required neither to retreat nor to consider whether he could safely retreat. Rather, said the judge, Peterson was entitled to stand his ground and use such force as was reasonably necessary under the circumstances to save his life and his person from pernicious bodily harm. But, the judge continued, if Peterson could have safely retreated but did not do so, that failure was a circumstance which the jury might consider, together with all others, in determining whether he went further in repelling the danger, real or apparent, than he was justified in going.

Peterson contends that this imputation of an obligation to retreat was error, even if he could safely have done so. He points out that at the time of the shooting he was standing in his own yard, and argues he was under no duty to move. We are persuaded to the conclusion that in the circumstances presented here, the trial judge did not err in giving the instruction challenged. Within the common law of self-defense there developed the rule of "retreat to the wall," which ordinarily forbade the use of deadly force by one to whom an avenue for safe retreat was open. This doctrine was but an application of the requirement of strict necessity to excuse the taking of human life, and was designed to insure the existence of that necessity. Even the innocent victim of a vicious assault had to elect a safe retreat, if available, rather than resort to defensive force which might kill or seriously injure.

In a majority of American jurisdictions, contrarily to the common law rule, one may stand his ground and use deadly force whenever it seems reasonably necessary to save himself. While the law of the District of Columbia on this point is not entirely clear, it seems allied with the strong minority adhering to the common law. In 1856, the District of Columbia Criminal Court ruled that a participant in an affray "must endeavor to retreat, . . . that is, he is obliged to retreat, if he can safely." The court added that "[a] man may, to be sure, decline a combat when there is no existing or apparent danger, but the retreat to which the law binds him is that which is the consequence." In a much later era this court, adverting to necessity as the soul of homicidal self-defense, declared that "no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict." That is not to say that the retreat rule is without exceptions. Even at common law it was recognized that it was not completely suited to all situations. Today it is the more so that its precept must be adjusted to modern conditions nonexistent during the early development of the common law of self-defense. One restriction on its operation comes to the fore when the circumstances apparently foreclose a withdrawal with safety.

The doctrine of retreat was never intended to enhance the risk to the innocent; its proper application has never required a faultless victim to increase his assailant's safety at the expense of his own. On the contrary, he could stand his ground and use deadly force otherwise appropriate if the alternative were perilous, or if to him it reasonably appeared to be. A slight variant of the same consideration is the principle that there is no duty to retreat from an assault producing an imminent danger of death or grievous bodily harm. "Detached reflection cannot be demanded in the presence of an uplifted knife," nor is it "a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him."

The trial judge's charge to the jury incorporated each of these limitations on the retreat rule. Peterson, however, invokes another—the so-called "castle" doctrine. It is well settled that one who through no fault of his own is attacked in his home is under no duty to retreat therefrom. The oft-repeated expression that "a man's home is his castle" reflected the belief in olden days that there were few if any safer sanctuaries than the home. The "castle" exception, moreover, has been extended by some courts to encompass the occupant's presence within the curtilage outside his dwelling. Peterson reminds us that when he shot to halt Keitt's advance, he was standing in his yard and so, he argues, he had no duty to endeavor to retreat.

Despite the practically universal acceptance of the "castle" doctrine in American jurisdictions wherein the point has been raised, its status in the District of Columbia has never been squarely decided. But whatever the fate of the doctrine in the District law of the future, it is clear that in absolute form it was inapplicable here. The right of self-defense, we have said, cannot be claimed by the aggressor in an affray so long as he retains that unmitigated role. It logically follows that any rule of no-retreat which may protect an innocent victim of the affray would, like other incidents of a forfeited right of self-defense, be unavailable to the party who provokes or stimulates the conflict. Accordingly, the law is well settled that the "castle" doctrine can be invoked only by one who is without fault in bringing the conflict on. That, we think, is the critical consideration here.

Holding

We need not repeat our previous discussion of Peterson's contribution to the altercation which culminated in Keitt's death. It suffices to point out that by no interpretation of

the evidence could it be said that Peterson was blameless in the affair. And while, of course, it was for the jury to assess the degree of fault, the evidence well nigh dictated the conclusion that it was substantial.

The only reference in the trial judge's charge intimating an affirmative duty to retreat was the instruction that a failure to do so, when it could have been done safely, was a factor in the totality of the circumstances which the jury might consider in determining whether the force which he employed was excessive. We cannot believe that any jury was at all likely to view Peterson's conduct as irreproachable. We conclude that for one who, like Peterson, was hardly entitled to fall back on the "castle" doctrine of no retreat, that instruction cannot be just cause for complaint.

As we have stated, Peterson moved for a judgment of acquittal at trial, and in this court renews his contention that the evidence was insufficient to support a conviction of manslaughter. His position is that the evidence, as a matter of law, established a right to use deadly force in self-defense. In considering that contention, we must accept the evidence "in the light most favorable to the Government, making full allowance for the right of the jury to draw justifiable inferences of fact from the evidence adduced at trial and to assess the credibility of the witnesses before it." We have already concluded that the evidence generated factual issues as to the effect, upon Peterson's self-defense claim, of his aggressive conduct and his failure to retreat. The judgment of conviction appealed from is accordingly affirmed.

Questions for Discussion

1. Outline the facts in *United States v. Peterson.*
2. Why does the court of appeals conclude that Peterson was an aggressor who was not entitled to a claim of self-defense?
3. Explain why the court of appeals imposed an obligation on Peterson to retreat before employing deadly force. What type of acts would have fulfilled Peterson's duty to retreat?
4. Why, if Peterson was standing in his own yard, could he not rely on the castle doctrine?
5. Does it make sense to hold Peterson criminally liable for killing a trespasser who was vandalizing Peterson's automobile and whom he had warned not to enter his yard?
6. Do you believe that individuals should be authorized to "hold their ground" under all circumstances rather than retreat?
7. Are the requirements of the law of self-defense too confusing to be understood by most people?
8. Should the area surrounding the home be considered part of a dwelling for purposes of the castle doctrine? What of a porch? In *State v. Blue,* 565 S.E.2d 133 (N.C. 2002), the North Carolina Supreme Court observed that many of the same activities that take place in the home take place on a porch. Should this depend on factors such as the size of the porch, whether the porch is enclosed, and the time of year?

Cases and Comments

The Castle Doctrine and Domestic Violence. John Gartland was found to have abused his wife Ellen for some years and the two had lived in separate bedrooms for ten years. They fought earlier in the evening at a bar and when they returned home, John accused Ellen of hiding the remote control to the television. John later entered her bedroom and threatened to "hurt" her. As he approached Ellen, she grabbed her son's shotgun from the bedroom closet. John vowed to kill her and she shot and killed John as he lunged forward. Ellen was convicted of reckless manslaughter. New Jersey is among the minority of states that impose a duty to retreat on an individual in his or her own home in those instances in which an individual is assaulted by a cohabitant. The New Jersey Supreme Court determined that Ellen did not have the exclusive right to occupy her bedroom and that John had regular access to the room. As a consequence, Ellen possessed a duty to retreat so long as this could have been safely accomplished prior to resorting to deadly force. The court, in reversing Ellen's conviction, ruled that the judge's instruction that the jury should consider whether Ellen could have safely retreated from the home should have been tailored to the specific facts of this case. The jury, instead, should have been instructed to consider whether Ellen could have safely made her way out of the bedroom while armed with the shotgun. What is the thinking behind the New Jersey rule? Should an individual be forced to retreat from his or her own home before using deadly force in self-defense? Why does the New Jersey Supreme Court distinguish between self-defense against a coinhabitant and the exercise of self-defense against a stranger in the home? What are the consequences of this rule for the victims of domestic violence? See *State v. Gartland,* 694 A.2d 564 (N.J. 1997).

In *State v. Glowacki,* William Glowacki was convicted of domestic assault. Glowacki met Priscilla Andrews in Alabama in 1998 and after exchanging visits every two weeks, Andrews quit her job and moved to Minnesota, where she moved in with Glowacki in April of 1999. The two almost immediately began fighting and, on April 2, Glowacki struck Andrews in the face, knocking her unconscious and bruising her eye. On April 8, 1998, the two again fought, Andrews alleging that Glowacki knocked her down and kicked her between fifty and

one hundred times. Glowacki explained that he kicked Andrews in response to a verbal assault and pushed her down when she appeared to be about to hit him in the head. Andrews was bruised on her arms and legs, injuries that are inconsistent with Glowacki's version. Glowacki appealed, based in part on the trial judge's instruction that he possessed a duty to retreat from the home before resorting to deadly force. The prosecutor argued on appeal that this rule helped to encourage a positive and peaceful resolution of disputes between roommates. The Minnesota Supreme Court, however, reasoned that the obligation to retreat from the home would confront women victimized by domestic violence with the difficult choice of abandoning their children. The court recognized that the home is a location of safety and that an individual should not be forced out of this comforting shelter. The court, however, concluded that even accepting Glowacki's version, he had relied on unnecessary and excessive force. Which is the better rule in regards to the duty to retreat of individuals sharing a dwelling, *Glowacki* or *Gartland?* See *State v. Glowacki,* 630 N.W. 2d 392 (Minn. 2001).

You Decide

8.4 Aiken and the victim had been next-door neighbors in an apartment building in the Bronx, New York, for roughly forty years. The two families had a falling out in 1994 or 1995 when a disagreement arose when the victim accused the defendant of siphoning his family's cable and telephone service. The service providers found no basis for this accusation. In 1997, the victim stabbed Aiken in the back resulting in his hospitalization. The two families continued to live next to one another from 1997 to 1999. This could not have been pleasant because the victim continually "threatened to shoot, stab or otherwise injure defendant. He made these threats to defendant's face, to his father and to neighbors—at one point even brandishing a boxcutter." On December 21, 1999, Aiken and the victim argued through the shared bedroom wall between their apartments. The defendant took a metal pipe and dented his side of the wall. The victim's mother called the police, and the victim left his apartment to go downstairs and open the building's front door for the police. The defendant remained inside his apartment, walked to the front door several times, and then opened the door when he saw the victim standing outside his door with a friend. "Still holding the metal pipe he had earlier used to hit the wall, the victim then engaged in an angry argument with defendant, who remained in his doorway. . . . [H]e continued standing in the doorway, never going into the hall, when the victim reached into his pocket, came up to defendant's face 'nose to nose,' and said 'he was going to kill' him." The defendant believed that he was about to be stabbed once again and hit the victim in the head with the metal pipe, killing the defendant. The trial court instructed the jury that "a person may . . . not use defensive deadly force if he knows he can with complete safety to himself avoid such use of deadly physical force by retreating." The trial court refused the defendant's request to "charge the jury that, if a defendant is in his home and close proximity of a threshold of his home, there is no duty to retreat." Do you agree with these jury instructions? Was Aiken in his home? Did Aiken act in self-defense in killing the victim? See *People v. Aiken,* 828 N.E.2d 74 (N.Y. 2005).

You can find the answer at www.sagepub.com/lippmanccl2e

Defense of Others

The common law generally limited the privilege of **intervention in defense of others** to the protection of spouses, family, employees, and employers. This was based on the assumption that an individual would be in a good position to evaluate whether these individuals were aggressors or victims in need of assistance. Some state statutes continue to limit the right to intervene, but this no longer is the prevailing legal rule. The Wisconsin statute provides that a person is justified in "threatening or using force against another when . . . he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force."

The early approach in the United States was the **alter ego rule**. This provides that an individual intervening "stands in the shoes" or possesses the "same rights" as the person whom he or she is assisting. The alter ego approach generally has been abandoned in favor of the reasonable person or **objective test for intervention in defense of others** of the Model Penal Code. Section 3.05 provides that an individual is justified in using force to protect another whom he or she reasonably believes (1) is in immediate danger and (2) is entitled under the Model Penal Code to use protective force in self-defense, and (3) such force is necessary for the protection of the other person. An intervener is not criminally liable under this test for a reasonable mistake of fact.

What is the difference between the alter ego rule and the objective test? An individual intervening under the alter ego rule acts at his or her own peril. The person "in whose shoes they stand" may in fact be an aggressor or may not possess the right of self-defense. The objective test, on the other hand, protects individuals who act in a "reasonable," but mistaken belief.

In *People v. Young,* two plainclothes detectives arrested a teenager for blocking traffic. The defendant intervened and hit one of the "two white men" who was "pulling" on the African American teenager. The defendant was convicted under the alter ego rule for intervening to defend an individual who, in fact, did not possess a right to self-defense. The New York Court of Appeals affirmed the conviction, but asked "what public interest is promoted by a principle which would deter one from coming to the aid of a fellow citizen whom he has reasonable grounds to believe is in imminent danger of personal injury at the hands of assailants?"[28] The New York legislature responded by modifying the law to provide that a "person . . . may use physical force upon another person when and to the extent that he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person. . . ."[29]

Remember, you may intervene to protect another, but you are not required to intervene. George Fletcher notes that the desire to provide protection to those who intervene on behalf of others reflects the belief that an attack against a single individual is a threat to the rule of law that protects us all.[30] Do you agree with the New York Court of Appeals in *Young* that the law should provide protection to individuals who intervene? *State v. Fair* is a well-known case from New Jersey that explains the objective approach.[31]

Defense of the Home

The home has historically been viewed as a place of safety, security, and shelter. The eighteenth-century English jurist Lord Coke wrote that "[a] man's house is his castle—for where shall a man be safe if it be not his own house." Coke's opinion was shaped by the ancient Roman legal scholars who wrote that "one's home is the safety refuge for everyone." The early colonial states adopted the English common law right of individuals to use deadly force in those instances in which they reasonably believe that this force is required to prevent an imminent and unlawful entry. The common law rule is sufficiently broad to permit deadly force against a rapist, burglar, or drunk who mistakenly stumbles into the wrong house on his or her way to a surprise birthday party.[32]

States gradually abandoned this broad standard and adopted statutes that restricted the use of deadly force in defense of the home. There is no uniform approach today, and statutes typically limit deadly force to those situations in which deadly force is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit "a felony" in the dwelling. Other state statutes strictly regulate armed force and only authorize deadly force in those instances in which it is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit a "forcible felony" involving the threat or use of violence against an occupant.[33] The first alternative would permit the use of deadly force against an individual who is intent on stealing a valuable painting, whereas the second approach would require that the art thief threaten violence or display a weapon.

The Model Penal Code balances the right to protect a dwelling from intruders against respect for human life and provides that deadly force is justified in those instances that the intruder is attempting to commit arson, burglary, robbery, other serious theft, or the destruction of property and has demonstrated that he or she poses a threat by employing or threatening to employ deadly force. Deadly force is also permissible under section 3.06(3)(d)(ii)(A)(B) where the employment of nondeadly force would expose the occupant to substantial danger of serious bodily harm.

The most controversial and dominant trend is toward so-called **make my day laws** that authorize the use of "any degree of force" against intruders who "might use any physical force . . . no matter how slight against any occupant." Colorado Revised Statutes section 18–1-704.5 provides:

> [T]he citizens of Colorado have a right to expect absolute safety within their own homes. . . . [A]ny occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight against any occupant. Any occupant of a dwelling using physical force . . . shall be immune from criminal prosecution for the use of such force . . . [and immune from civil liability] for injuries or death resulting from the use of such force.

Florida Statutes section 776.013 presumes that an intruder who unlawfully enters a home, automobile, or boat intends to commit a forcible felony. An occupant may use nondeadly or deadly force and does not have the burden in court of establishing that the intruder intended to inflict death or great bodily harm.

In *State v. Anderson,* the Oklahoma Court of Criminal Appeals stressed that under the state's make my day law, the occupant possesses unlimited discretion to employ whatever degree of force he or she desires to based "solely upon the occupant's belief that the intruder might use any force against the occupant." In practice, this is a return to the original common law rule because a jury would likely find reasonable justification to believe that almost any intruder poses at least a threat of "slight" physical force against an occupant.[34] The make my day law raises the issue of the proper legal standard for the use of force in defense of the dwelling. Should a homeowner be required to wait until the intruder poses a threat of serious harm?

Professor Joshua Dressler argues that the various legal standards for protection of the dwelling make little difference because in an age marked by fear of "home invasion" and violent crime, a jury will almost always find the use of deadly force is justified against an intruder.[35] The next case, *People v. Ceballos,* discusses whether it is legal to employ a spring gun to protect against illegal entry into the home.

Was Ceballos justified in defending his home with a spring gun?

People v. Ceballos, *526 P.2D 241 (CAL. 1974),* Opinion by: Burke, J.

Facts

Defendant lived alone in a home in San Anselmo. The regular living quarters were above the garage, but defendant sometimes slept in the garage and had about $2,500 worth of property there. In March 1970 some tools were stolen from defendant's home. On May 12, 1970, he noticed the lock on his garage doors was bent and pry marks were on one of the doors. The next day he mounted a loaded .22 caliber pistol in the garage. The pistol was aimed at the center of the garage doors and was connected by a wire to one of the doors so that the pistol would discharge if the door was opened several inches.

The damage to defendant's lock had been done by a sixteen-year-old boy named Stephen and a fifteen-year-old boy named Robert. On the afternoon of May 15, 1970, the boys returned to defendant's house while he was away. Neither boy was armed with a gun or knife. After looking in the windows and seeing no one, Stephen succeeded in removing the lock on the garage doors with a crowbar, and, as he pulled the door outward, he was hit in the face with a bullet from the pistol.

Stephen testified: He intended to go into the garage "[for] musical equipment" because he had a debt to pay to a friend. His "way of paying that debt would be to take [defendant's] property and sell it" and use the proceeds to pay the debt. He "wasn't going to do it [i.e., steal] for sure, necessarily." He was there "to look around," and "getting in, I don't know if I would have actually stolen."

Defendant, testifying in his own behalf, admitted having set up the trap gun. He stated that after noticing the pry marks on his garage door on May 12, he felt he should "set up some kind of a trap, something to keep the burglar out of my home." When asked why he was trying to keep the burglar out, he replied, " . . . Because somebody was trying to steal my property . . . and I don't want to come home some night and have the thief in there . . . usually a thief is pretty desperate . . . and . . . they just pick up a weapon . . . if they don't have one . . . and do the best they can." When asked by the police shortly after the shooting why he assembled the trap gun, defendant stated that "he didn't have much and he wanted to protect what he did have." The jury found defendant guilty of assault with a deadly weapon. . . .

Issue

Defendant contends that had he been present he would have been justified in shooting Stephen since Stephen was attempting to commit burglary . . . that . . . defendant had a right to do indirectly what he could have done directly, and that therefore any attempt by him to commit a violent injury upon Stephen was not "unlawful" and hence not an assault. The People argue that . . . as a matter of law a trap gun constitutes excessive force, and that in any event the circumstances were not in fact such as to warrant the use of deadly force. . . .

Reasoning

In the United States, courts have concluded that a person may be held criminally liable under statutes proscribing homicides and shooting with intent to injure, or civilly liable, if he sets upon his premises a deadly mechanical device and that device kills or injures another. . . . However, an exception to the rule that there may be criminal and civil

liability for death or injuries caused by such a device has been recognized where the intrusion is, in fact, such that the person, were he present, would be justified in taking the life or inflicting the bodily harm with his own hands. . . . The phrase "were he present" does not hypothesize the actual presence of the person . . . but is used in setting forth in an indirect manner the principle that a person may do indirectly that which he is privileged to do directly.

Allowing persons, at their own risk, to employ deadly mechanical devices imperils the lives of children, firemen and policemen acting within the scope of their employment, and others. Where the actor is present, there is always the possibility he will realize that deadly force is not necessary, but deadly mechanical devices are without mercy or discretion. Such devices "are silent instrumentalities of death. They deal death and destruction to the innocent as well as the criminal intruder without the slightest warning. The taking of human life [or infliction of great bodily injury] by such means is brutally savage and inhuman."

It seems clear that the use of such devices should not be encouraged. Moreover, whatever may be thought in torts [a civil action for damages], the foregoing rule setting forth an exception to liability for death or injuries inflicted by such devices is inappropriate in penal law for it is obvious that it does not prescribe a workable standard of conduct; liability depends upon fortuitous results. We therefore decline to adopt that rule in criminal cases.

Furthermore, even if that rule were applied here, as we shall see, defendant was not justified in shooting Stephen. California Penal Code (CPC) section 197 provides: "Homicide is . . . justifiable . . . 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or, 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony. . . ." Since a homicide is justifiable under the circumstances specified in section 197, it follows that an attempt to commit a violent injury upon another under those circumstances is justifiable.

By its terms, subdivision 1 of CPC section 197 appears to permit killing to prevent any "felony," but in view of the large number of felonies today and the inclusion of many that do not involve a danger of serious bodily harm, a literal reading of the section is undesirable. . . . We must look further into the character of the crime, and the manner of its perpetration. When these do not reasonably create a fear of great bodily harm, as they could not if defendant apprehended only a misdemeanor assault, there is no cause for the exaction of a human life. . . . The term "violence or surprise" in subdivision 2 is found in common law authorities . . . and, whatever may have been the very early common law, the rule developed at common law that killing or use of deadly force to prevent a felony was justified only if the offense was a forcible and atrocious crime.

Examples of forcible and atrocious crimes are murder, mayhem, rape, and robbery. In such crimes "from their atrocity and violence human life [or personal safety from great harm] either is, or is presumed to be, in peril." . . .

Burglary has been included in the list of such crimes. However, in view of the wide scope of burglary . . . it cannot be said that under all circumstances burglary . . . constitutes a forcible and atrocious crime.

Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life or for the use of deadly force. The character and manner of the burglary could not reasonably create such a fear unless the burglary threatened, or was reasonably believed to threaten, death or serious bodily harm.

Holding

In the instant case the asserted burglary did not threaten death or serious bodily harm, since no one but Stephen and Robert was then on the premises. . . . There is ordinarily the possibility that the defendant, were he present, would realize the true state of affairs and recognize the intruder as one whom he would not be justified in killing or wounding. We thus conclude that defendant was not justified under CPC section 197, subdivisions 1 or 2, in shooting Stephen to prevent him from committing burglary. . . .

Questions for Discussion

1. Ceballos contends that the spring gun only resulted in the employment of the same degree of force that he would have been justified in employing had he been present. The California Supreme Court rejects this standard on the ground that the mechanism is "brutally savage and inhumane." What is the basis for this conclusion? Does this suggest that spring guns are prohibited under all circumstances? Do you agree that Ceballos is proposing an "unworkable standard"?
2. Burglary involves breaking and entering with an intent to commit a felony. Why is burglary not considered a forcible and atrocious crime? What types of offenses are considered forcible and atrocious crimes?
3. Is the standard for the use of deadly force against intruders proposed by the court too complicated to be easily understood? Should you have the right to use deadly force against intruders in your house regardless of whether they pose a threat to commit a forcible and atrocious crime?
4. The Model Penal Code section 3.06(5) provides that a "device" such as a spring gun may only be employed in the event that it is not "designed to cause or known to create a substantial risk of causing death or serious bodily injury." Do you agree?

You Decide

8.5 Law is a thirty-two-year-old African American who moved into a white, middle-class neighborhood with his wife. His home was broken into within two weeks and his clothes and personal property were stolen. Law purchased a 12-gauge shotgun and installed double locks on his doors. One week later, a neighbor saw a flickering light in Law's otherwise darkened house at roughly 8:00 P.M., and because the home had previously been burglarized, the neighbor called the police. Officers Adams and Garrison examined whether windows in the house had been tampered with, and they shined their flashlights into the dwelling. Then they entered the back screened porch where they noticed that the windowpanes on the door to the house had been temporarily put into place with a few pieces of molding. They had no way of knowing that Law had placed the windows in the door in this fashion following the burglary. Officer Garrison removed the molding and glass and reached inside to open the door. He determined that it was a deadlock and decided that the door could not have been opened without a key. As the officer removed his hand from the window, he was killed by a shotgun blast. Officer Potts, the next officer to arrive, testified that he saw Officer Adams running to his squad car yelling that he had been shot at from inside the home. A number of officers arrived, and believing there was a burglar in the house, they unleashed a massive attack as indicated by the fact that there were forty bullet holes in the kitchen door alone.

Law was in the bedroom with his wife and testified that he heard noise outside the house, and he went downstairs and armed himself with a shotgun he had purchased two days following the burglary. Law then went to the back door and observed a "fiddling around with the door" and then heard scraping on the windowpane along with a voice saying, "Let's go in." Law could not see the back porch because of curtains covering the window on the door. When Law heard the voice say, "Let's go in," he was admittedly scared and testified that he could have either intentionally or unintentionally pulled the trigger of the shotgun. At one point following his arrest, Law indicated to the police that he believed that the intruders were members of the Ku Klux Klan. The prosecutor conceded in closing argument that Law "probably thought he shot a burglar or whatever that was outside." Did Law act unreasonably and employ excessive force against the "intruders"? Was Law entitled to the justification of defense of habitation? See *Law v. State,* 318 A.2d 859 (Md. Ct. Spec. App. 1974). See also *Law v. State,* 349 A.2d 295 (Md. Ct. Spec. App. 1975).

You can find the answer at www.sagepub.com/lippmanccl2e

Execution of Public Duties

The enforcement of criminal law requires that the police detain, arrest, and incarcerate individuals and seize and secure property. This interference with life, liberty, and property would ordinarily constitute a criminal offense. The law, however, provides a defense to individuals executing public duties. This is based on a judgment that the public interest in the enforcement of the law justifies intruding on individual liberty.

There are few areas as controversial as the employment of deadly force by police officers in arresting a fleeing suspect. This, in effect, imposes a fatal punishment without trial. Professor Joshua Dressler writes that until the fourteenth century, law enforcement officers possessed the right to employ deadly force against an individual whom the officer reasonably believed had committed a felony. This was the case even in those circumstances in which a felon could have been apprehended without the use of deadly force. Dressler writes that the authorization of deadly force was based on the notion that felons were "outlaws at war with society" whose lives could be taken to safeguard society. This presumption was strengthened by the fact that felons were subject to capital punishment and to the forfeiture of property. Felons were considered to have forfeited their right to life and the police were merely imposing the punishment that awaited them in any event.[36] The police officer, as noted by the Indiana Supreme Court, is a "minister of justice, and is entitled to the peculiar protection of the law. Without submission to his authority there is no security and anarchy reigns supreme. He must of necessity be the aggressor, and the law affords him special protection."[37] In contrast, only reasonable force could be applied to apprehend a **misdemeanant**. Misdemeanors were punished by a modest fine or brief imprisonment and were not considered to pose a threat to the community. As a consequence, it was considered inhumane for the police to employ deadly force against individuals responsible for minor violations of the law.[38]

The arming of the police and the **fleeing felon rule** were reluctantly embraced by the American public that, although distrustful of governmental power, remained fearful of crime. With a population of three million, Chicago was one of the most violent American cities in the 1920s. A crime survey covering 1926 and 1927 concluded that although most police killings were justified, in other cases "it would seem that the police were hasty and there might be some doubt as to the justification; but in every such instance the coroner's jury returned a verdict of justifiable

homicide and no prosecutions resulted. From this we may conclude that the police of the city of Chicago incur no hazard by shooting to kill within their discretion."[39] Some state legislatures attempted to moderate the fleeing felon rule by adopting the standard that a police officer who reasonably believed that deadly force was required to apprehend a suspect would be held criminally liable in the event that he was shown to have been mistaken.[40]

The judiciary began to seriously reconsider the application of the fleeing felon rule in the 1980s. Only a small number of felonies remained punishable by death, and offenses in areas such as white-collar crime posed no direct danger to the public. The rule permitting the employment of deadly force against fleeing felons developed prior to arming the police with firearms in the mid-nineteenth century. As a result, deadly force under the fleeing felon rule was traditionally employed at close range and was rarely invoked to apprehend a felon who escaped an officer's immediate control.[41] An additional problematic aspect of the fleeing felon rule was the authorization for private citizens to employ deadly force, although individuals risked criminal liability in the event that they were proven to have been incorrect.[42]

The growing recognition that criminal suspects retained various constitutional rights also introduced a concern with balancing the interests of suspects against the interests of the police and society.

A number of reasons are offered to justify a limitation on the use of deadly force to apprehend suspects:

1. The shooting of suspects may lead to *community alienation and anger,* particularly in instances in which the evidence indicates that there was no need to employ deadly force or the deceased is revealed to have been unarmed or innocent.
2. *Bystanders* may be harmed or injured by stray bullets.
3. *Substantial monetary damages* may be imposed on a municipality in civil suits alleging that firearms were improperly employed.
4. *Police officers* who employ deadly force can suffer *psychological stress,* strain, and low morale, and may change careers or retire.

The Modern Legal Standard

In 1986, the U.S. Supreme Court reviewed the fleeing felon rule in the next case in the chapter, *Tennessee v. Garner.* The case was brought under a civil rights statute by the family of the deceased who was seeking monetary damages for deprivation of the "rights . . . secured by the Constitution," 42 U.S.C. § 1983. The Supreme Court determined that the police officer violated Garner's Fourth Amendment right to be free from "unreasonable seizures." Although this was a civil rather than criminal decision, the judgment established the standard to be employed in criminal prosecutions against officers charged with the unreasonable utilization of deadly force.

We may question whether it is fair to place the fate of a police officer in the hands of a judge or jury who may not fully appreciate the pressures confronting an officer required to make a split-second decision whether to employ armed force. Others point to the fact that the utilization of deadly force typically occurs in situations in which there are few witnesses and the judge and jury must rely on the well-rehearsed testimony of the police. What do you think of the standard established in *Garner?*

The Statutory Standard

Statutory Provision: The Missouri Statute that addresses the use of force by a police officer in making an arrest is fairly representative.

Missouri Revised Statutes Section 563.046. Law Enforcement Officer's Use of Force in Making an Arrest

(1) A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonably believes to have committeed an offense because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other sections of this chapter, he

is . . . justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

(2) The use of any physical force in making an arrest is not justified . . . unless the arrest is lawful or the law enforcement officer reasonably believes the arrest is lawful.

(3) A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only. . . .

. . .

(4) When he immediately believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested:

(a) Has committed or attempted to commit a felony; or
(b) Is attempting to escape by use of a deadly weapon; or
(c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.

(5) The defendant shall have the burden of injecting the issue of justification under this section.

Model Penal Code

Section 3.07. Use of Force in Law Enforcement

(1) Use of Force Justifiable to Effect an Arrest. . . . The use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitation on the Use of Force.

(a) The use of force is not justifiable under this section unless:
  (i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
  (ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:
  (i) the arrest is for a felony; and
  (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
  (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
  (iv) the actor believes that:

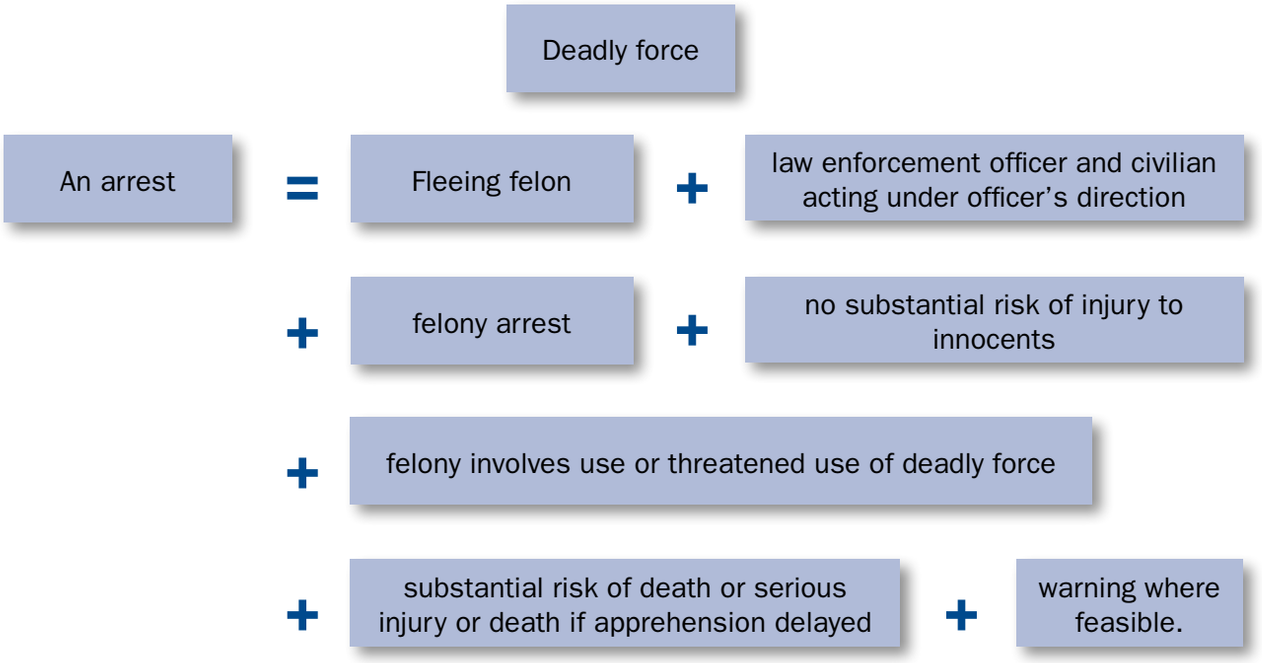
    (A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

    (B) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Analysis

1. The Model Penal Code substantially restricts the common law on the employment of deadly force against fleeing felons.
2. Deadly force is limited to the police or to individuals assisting an individual believed to be a police officer. This limits the utilization or supervision of the use of deadly force to individuals trained in the employment of firearms.
3. The employment of deadly force is restricted to felonies that the police officer believes involves the use or threatened use of deadly force or to situations in which the police officer believes that a delay in arrest will create a substantial risk that the person to be arrested will cause death or serious bodily harm.
4. The police officer possesses a reasonable belief that there is no substantial risk to innocent individuals.

The Legal Equation



Was the officer justified in killing the burglar?

Tennessee v. Garner, *471 U.S. 1 (1985), Opinion by: White, J.*

Issue

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Facts

At about 10:45 P.M. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a six-foot-high chain-link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5'5" or 5'7" tall [In fact, Garner, an eighth grader, was 15. He was 5'4" tall and weighed around 100 or 110 pounds]. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body. . . .

Garner had rummaged through one room in the house, in which, in the words of the owner, "[all] the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered.

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[if], after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40–7-108 (1982). The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. Although the statute does not say so explicitly, Tennessee law forbids the use of deadly force in the arrest of a misdemeanant. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. § 1983 for asserted violations of Garner's constitutional rights. . . . After a three-day bench trial, the District Court entered judgment for all defendants. . . . [I]t . . . concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." The Court of Appeals reversed . . .

Reasoning

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. A police officer may arrest a person if he has probable cause to believe that person committed a crime. . . . Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. . . .

The same balancing process . . . demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement. . . ."

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. . . . [W]hile the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. . . . Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life [the use of punishment to discourage flight has been largely ignored. The Memphis City Code punishes escape with a $50 fine].

Holding

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. . . . The fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. Statistics demonstrate that burglaries only rarely involve physical violence. During the ten-year period from 1973 through 1982, only 3.8 percent of all burglaries involved violent crime. . . .

We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. . . .

Dissenting, *O'Connor, J.,* with whom *Burger, C.J.,* and *Rehnquist, J.,* join

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person's home, but also "[pose] real risk of serious harm to others." According to recent Department of Justice statistics, "[three-fifths] of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." During the period 1973 through 1982, 2.8 million such violent crimes were committed in the course of burglaries. Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." . . .

Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent fifteen-year-old without sorrow, much less disapproval. . . . The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime. . . .

I cannot accept the majority's creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime. . . . I respectfully dissent.

Questions for Discussion

1. Did Officer Hymon's shooting of the suspect comply with the Tennessee statute? How does the Tennessee statute differ from the holding in *Garner?* Do you believe that the Supreme Court majority places too much emphasis on protecting the fleeing felon?
2. Justice O'Connor writes at one point in her dissent that the Supreme Court majority offers no guidance on the factors to be considered in determining whether a suspect poses a significant threat of death or serious bodily harm and does not specify the weapons, ranging from guns to knives to baseball bats, that will justify the use of deadly force. Is Justice O'Connor correct that the majority's "silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances"?
3. Summarize the facts that Officer Hymon considered in the "split second" that he decided to fire at the suspect. Was his decision reasonable? What of Justice O'Connor's conclusion that the Supreme Court decision will lead to a large number of cases in which lower courts are forced to "struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime."
4. Is Justice O'Connor correct that the Supreme Court majority unduly minimizes the serious threat posed by burglary? Should the Supreme Court be setting standards for police across the country based on the facts in a single case?

Cases and Comments

1. ***The Objective Test for Excessive Force Under the Fourth Amendment.*** The U.S. Supreme Court clarified the standard for evaluating the use of excessive force by police under the Fourth Amendment in *Graham v. Connor* in 1989. Graham, a diabetic, asked Berry to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Graham encountered a long line and hurried out of the store and asked Berry to drive him to a friend's house instead. This aroused the suspicion of a police officer who pulled Berry's automobile over and called for backup officers to assist him in investigating what occurred in the store. The backup officers handcuffed Graham and dismissed Berry's warning that Graham was suffering from

a "sugar reaction." Graham began running around the car, sat down on the curb and briefly collapsed. An officer, concluding that Graham was drunk, cuffed his hands behind his back, placed him face down on the hood, and responded to Graham's pleas for sugar by shoving his face against the car. Four officers grabbed Graham and threw him headfirst into the police car. The police also refused to permit a recently arrived friend of Graham's to give Graham orange juice. The officers then received a report that Graham had done nothing wrong at the convenience store and released him. Graham sustained a broken foot, cuts on his wrists, a bruised forehead, injured shoulder, and claimed to experience a continual ringing in his ear.

The U.S. Supreme Court ruled that claims that the law enforcement officers employed excessive force in the course of an arrest, investigatory stop, or other seizure of a suspect should be analyzed under the Fourth Amendment reasonableness standard. This entails an inquiry into whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them without regard to their underlying intent or motivation.

The reasonableness of the use of force according to the Supreme Court "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." This analysis should focus on the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or other individuals, and whether the suspect is actively resisting arrest or evading arrest by flight.

Would you find it difficult as a juror to place yourself in the position of an officer confronting an aggressive and possibly armed or physically imposing suspect? Is it fairer for courts to utilize a "reasonable officer under the circumstances standard" or to use a test that asks whether the degree of force is "understandable under the circumstances?" Are courts "second-guessing" the police? See *Graham v. Connor,* 490 U.S. 386 (1989).

2. ***Hot Pursuit.*** In *Scott v. Harris,* the U.S. Supreme Court confronted the question: May "an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders"? In March 2001, a Georgia county deputy clocked Harris's vehicle traveling at seventy-three mph on a road with a fifty-five-mph speed limit. The deputy activated his blue flashing lights indicating that Harris should pull over to the side of the road. He instead sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding eighty-five mph. Deputy Timothy Scott heard the radio communication and joined the pursuit along with other officers. "Scott took over as the lead pursuit vehicle. Six minutes and nearly ten miles after the chase had begun, Scott requested permission to terminate the episode by employing a 'Precision Intervention Technique' (PIT) maneuver, which causes the fleeing vehicle to spin to a stop." Scott had received permission to execute this maneuver by his supervisor, who had told him to "go ahead and take him out." Scott concluded that it was safer to apply his push bumper to the rear of respondent's vehicle. As a result, Harris lost control of his vehicle and the automobile left the roadway, ran down an embankment, overturned, and crashed. Harris was badly injured and was rendered a quadriplegic. He filed a civil suit against Deputy Scott and others alleging "violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment." The U.S. Court of Appeals for the Eleventh Circuit "affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial." The Court of Appeals concluded that Scott's actions constituted "deadly force" under *Tennessee v. Garner* and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure [and] a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights."

In 2007, U.S. Supreme Court Justice Antonin Scalia writing for the Supreme Court majority held that Officer Scott had acted in a reasonable fashion. He noted that there was a videotape of the high-speed pursuit that portrays a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." In evaluating the reasonableness of Officer Scott's actions, Justice Scalia held that the Supreme Court must balance "the risk of bodily harm that Scott's actions posed to Harris" against "the threat to the public that Scott was trying to eliminate." Harris's high-speed flight "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." On the other hand, Officer Scott's actions "posed a high likelihood of serious injury or death to Harris—though not the near certainty of death posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car and shooting the motorist." In this situation, Justice Scalia found that Officer Scott had acted reasonably to protect the innocent members of the public who were placed at risk.

What of abandoning the pursuit? Justice Scalia noted that this would not have insured that Harris would have felt sufficiently free from apprehension by the police to slow down and it would reward a motorist who fled from the police and who placed the public at risk. "The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. . . . The car chase that

[Harris] initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise."

Justice Stevens, in dissent, argued that the reasonable course would have been to abandon the pursuit and proposed the following rule: "When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated. . . . Pursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public." As a judge, how would you decide this case? See *Scott v. Harris,* 550 U.S.__(2007).

You Decide

8.6 Officer Pfeffer was off duty and spending the day at home. His wife, Sally, noticed a man, later identified as Paul Billingsley, cross the street and attempt to enter their front yard. He was prevented by the bushes from entering the yard and then walked down the sidewalk and entered a neighbor's driveway. Sally called Officer Pfeffer's attention to Billingsley's movements and watched as Billingsley unsuccessfully attempted to enter the locked back door of two homes, before gaining entrance to the home of Gary Machal. Officer Pfeffer asked his wife to call 911, retrieved his service revolver, and confronted Billingsley in Machal's home. Pfeffer drew his revolver and informed Billingsley that he was a police officer and ordered the intruder to halt and to raise his hands. Billingsley had a purse in his left hand and Pfeffer could not observe his right hand. Billingsley ran out the back door onto the deck and jumped some fifteen feet over the railing to the ground. Pfeffer ran to the railing and ordered the suspect to halt. Billingsley landed in a crouched position and then "rotated his left shoulder." Officer Pfeffer fired a shot that struck Billingsley in the lower right back and exited out his groin. Pfeffer did not observe a weapon and the suspect was determined to be unarmed. Billingsley filed an action under 42 U.S.C. § 1983 for a violation of his Fourth Amendment rights. Consider the arguments that might be offered by the prosecution and defense. Was Officer Pfeffer justified in resorting to deadly force? See *Billingsley v. City of Omaha,* 277 F.3d 990 (8th Cir. 2002).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

On November 14, 2007, at roughly 11:00 A.M., sixty-two-year-old computer consultant Joe Horn looked out his window in a Houston suburb to see two burglars breaking into the house next door. Horn called 911 and proceeded to load his shotgun. The 911 tape recorded by the Pasadena Police Department indicates that Horn urged the police to hurry to the crime scene before the burglars had a chance to flee. He asked whether he should "stop them" with his shotgun. The emergency operator cautioned him not to shoot because "[a]in't no property worth shooting somebody over, O.K.?" Horn responded that he feared for his own safety and had the right to defend himself. "Well here it goes, buddy." The 911 tape records three explosions. Horn explained to the operator that "I had no choice. . . . They came in the front yard with me, man." The police arrived in time to see Horn shoot and kill the two burglars. Hernando Torres, thirty-eight, was found dead across the street and Diego Ortiz, thirty, collapsed on a neighbor's lawn. The two burglars reportedly had been shot in the back. Both Torres and Ortiz were determined to be illegal immigrants from Columbia and were found with a pillowcase stuffed with jewelry and roughly $2,000 in cash. Ortiz had been deported from the United States in 1999 after having been sentenced to twenty-five years in prison for cocaine offenses and the two dead men were described as being members of an organized burglary ring. Critics accused Horn of being motivated by racist attitudes and that he had intentionally killed Torres and Ortiz and had not acted in self-defense. Horn's defenders pointed out that at least one of the burglars may have ventured onto Horn's property and that the family whose property he defended was Vietnamese.

The prosecutor announced that his office would pursue murder charges against Horn, a crime carrying a prison term of between five and ninety-five years. Public interest in the case escalated as crowds gathered outside Horn's home. The transcript of the 911 call indicated that Horn had pointed out to the dispatcher that in September 2007 Texas had adopted a version of the "castle doctrine" that provided that an individual in the home did not have an obligation to retreat before resorting to self-defense in those instances in which a reasonable person would not retreat. Texas law does not authorize the use of deadly force to apprehend burglars fleeing a home during daytime. In June 2008, a Texas grand jury sided with Horn and refused to charge him with a criminal offense.

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In the last several years, roughly twenty states have adopted some version of the castle doctrine or have limited the duty of an individual to retreat when confronted with an aggressor threatening deadly force. The peril of such laws is illustrated by an incident that occurred in Texas a month before Horn killed the individuals robbing his neighbors' home. An elderly man shot two "intruders" he observed entering his front yard who on closer examination turned out to be a fifteen-year-old neighbor and his friend. Several Texas media commentators questioned whether the newly introduced castle doctrine had inspired people to take the law into their own hands and had unleashed a flurry of gunfire. What is your view?

Resisting Unlawful Arrests

English common law recognized the right to resist an unlawful arrest by reasonable force. The only limitation was that this did not provide a defense to the murder of a police officer. The philosophical basis for the defense of resisting an unlawful arrest is explained in the famous case of *Queen v. Tooley,* in which Chief Justice Holt of the King's Bench pronounced that "if one is imprisoned upon an unlawful authority, it is sufficient provocation to all people out of compassion . . . it is a provocation to all the subjects of England."[43]

The U.S. Supreme Court, in *John Bad Elk v. United States,* in 1900, recognized that this rule had been incorporated into the common law of the United States. The Supreme Court ruled that "[i]f the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest."[44] In 1948, the U.S. Supreme Court affirmed that "[o]ne has an undoubted right to resist an unlawful arrest . . . and courts will uphold the right of resistance in proper cases."[45]

The English common law rule was recognized as the law in forty-five states as late as 1963. Today, only twelve states continue to recognize the English rule and have not adopted the **American rule for resistance to an unlawful arrest**. The jurisdictions that retain the rule are generally located in the South, perhaps reflecting the region's historical distrust of government.[46] The abandonment of the recognition of a right to resist by a majority of states is because of the fact that the rule is no longer thought to make much sense. The common law rule reflected the fact that imprisonment, even for brief periods, subjected individuals to a "death trap" characterized by disease, hunger, and violence. However, today:

- Incarcerated individuals are no longer subjected to harsh, inhuman, and disease-ridden prison conditions that result in illness and death.
- An arrest does not necessarily lead to a lengthy period of incarceration. Individuals have access to bail and are represented by hired or appointed attorneys at virtually every stage of the criminal justice process.
- The complexity of the law often makes it difficult to determine whether an arrest is illegal. An officer might, in good faith, engage in what is later determined to be an illegal search, discover drugs, and arrest a suspect. The legality of the search and resulting arrest may not be apparent until an appeals court decides the issue.
- The development of sophisticated weaponry means that confrontations between the police and citizens are likely to rapidly escalate and result in severe harm and injury to citizens and to the police.
- Individuals have access to a sophisticated process of criminal appeal and may bring civil actions for damages.
- The common law rule promotes an unacceptable degree of social conflict and undermines the rule of law.[47]

Individuals continue to retain the right to resist a police officer's application of unnecessary and unlawful force in executing arrest. Judges reason that individuals are not adequately protected against the infliction of death or serious bodily harm by the ability to bring a civil or criminal case charging the officer with the application of excessive force.[48]

The **English rule for resistance to an unlawful arrest**, which provides that an individual may resist an illegal arrest, is still championed by some state courts. The Mississippi Supreme Court noted in *State v. King* that "every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary."[49]

Judge Sanders of the Washington Supreme Court dissented from his colleagues' abandonment of the English rule and observed that the police power is "not measured by how hard the officer can wield his baton but rather by the rule of law. Yet by fashioning the rule as it has, the majority legally privileges the aggressor while insulting the victim with a criminal conviction for justifiable resistance."[50] The Maryland Supreme Court observed that law enforcement officers were rarely called to account for illegal arrests by civil or criminal prosecutions and that the right to resist provides an effective deterrent to police illegality.[51]

In the next case in the chapter, *State v. Hobson,* the Wisconsin Supreme Court is asked to rule on whether to abandon the English rule on resistance to an illegal arrest. Do you favor the English or American rule?

The Statutory Standard

Consider the Arizona statute on resisting an illegal arrest.

Arizona Revised Statutes Annotated Section 13–404. Justification: Self-Defense

. . .

B. The threat or use of physical force against another is not justified:

. . .

2. To resist an arrest that the person knows or should know is being made by a peace officer or by a person acting in a peace officer's presence and at his direction, whether the arrest is lawful or unlawful, unless the physical force used by a peace officer exceeds that allowed by law. . . .

Model Penal Code

Section 3.04. Use of Force in Self-Defense

(1) Use of Force Justifiable for Protection of the Person. . . . The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.
(a) The use of force is not justifiable under this Section:
(i) to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful. . . .

Analysis

An individual is not entitled to forcefully resist an unlawful arrest by a law enforcement officer. This restriction does not apply where the aggressor "is not known to the actor to be a peace officer." Self-defense, however, is permitted against a police officer's use of "more force than is necessary" to arrest an individual.

The Legal Equation

A lawful or unlawful arrest ≠ resistance by physical force.

Excessive force in an arrest = proportionate self-defense.

Was Hobson justified in resisting the illegal arrest of her five-year-old son?

State v. Hobson, *577 N.W.2D 825 (WIS. 1998), Opinion by: Geske, J.*

The question certified to this court is whether Wisconsin recognizes a common law right to forcibly resist an unlawful arrest. In this case, the State does not challenge the circuit court's determination that Beloit police officers lacked probable cause to arrest the mother of a five-year-old boy after she refused to allow officers to speak to her son about a stolen bicycle. When the officers decided to arrest the mother for obstruction of an officer, the mother resisted and struck one of the officers. This action resulted in her arrest for an additional charge of battery to a peace officer. . . .

We conclude, based on the common law in this state, that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. However, based upon public policy, we now decide to abrogate that common law affirmative defense. Our decision to abrogate has prospective application only. We therefore affirm the order of the circuit court dismissing the battery charge against Ms. Hobson.

Facts

The defendant, Ms. Shonna Hobson, was the mother of a five-year-old boy. On July 31, 1995, a member of the Beloit Police Department, Officer Nathan Shoate, went to a home address to interview a child suspected in a bike theft. Another juvenile had reported to Officer Shoate that he had seen Ms. Hobson's son riding the juvenile's sister's stolen bicycle. When Officer Shoate reached the address reported by the juvenile, he saw Ms. Hobson's son near a bicycle. When the officer got out of his car, he saw Ms. Hobson's son run upstairs. The juvenile who had reported the theft was in Officer Shoate's car at the time. The juvenile pointed out Ms. Hobson's son as the person he had seen on the stolen bicycle. Officer Shoate met Ms. Hobson at her home, and told her that her son was suspected in a bike theft. Specifically, the officer told Ms. Hobson that her son was seen on a stolen bike and that the officer would need to talk to the boy about where the boy got the bike.

Ms. Hobson told her son to go in the house. She then told Officer Shoate that her son was not on a bicycle, and that he had his own bike. Ms. Hobson, according to the officer, became a bit irritated, and refused to allow Officer Shoate to speak with her son. She said that her son did not do anything, and had not stolen any bike. Officer Shoate then told Ms. Hobson that he would have to take her son to the police station to be interviewed about the stolen bicycle, and gave Ms. Hobson the opportunity to go along to the station. She replied that the officer was not taking her son anywhere.

At that point in the conversation, because of Ms. Hobson's resistance, Officer Shoate called for backup police officers to assist him. Shortly thereafter, Officers Eastlick, Anderson and Alisankus arrived at the Hobson address. According to Officer Eastlick's report, when the three backup officers arrived Ms. Hobson was standing with her son on the front steps of her residence yelling, swearing and saying "bullshit" in a very loud voice. Officer Shoate then repeated to Ms. Hobson that they had to take her son to the police station, to which Ms. Hobson again replied "You aren't taking my son anywhere." Officer Shoate then advised Ms. Hobson that she was under arrest for obstructing an officer.

Officers Eastlick and Alisankus proceeded to attempt to handcuff Ms. Hobson. When Officer Eastlick tried to take hold of Ms. Hobson's arm and advise her that she was under arrest, Ms. Hobson pushed the officer away. Ms. Hobson became combative and struck Officer Alisankus across the face. Ms. Hobson then was taken to the ground by other officers. Both Officers Shoate and Eastlick reported that once she was on the ground, Ms. Hobson continued to fight with Officer Alisankus and kicked at Officer Eastlick.

On August 1, 1995, Ms. Hobson was charged with obstructing an officer, disorderly conduct, and resisting an officer. In an amended complaint filed August 15, 1995, the prosecutor added a fourth count. The amended complaint also charged Ms. Hobson with the felony of causing intentional bodily harm (battery) to a peace officer. The amended complaint included a report by Officer Alisankus, stating that he assisted other officers in arresting Ms. Hobson for obstructing at her residence. He reported that Officer Shoate advised Ms. Hobson that she was under arrest for obstructing, and that Officer Eastlick then attempted to take Ms. Hobson into custody. Ms. Hobson then forcibly pulled her arm away from Officer Eastlick, stating "let me go." Officer Alisankus then took Ms. Hobson's right hand and wrist in an effort to apply a compliance hold. At that point Ms. Hobson began to struggle and tried to pull away from Officer Alisankus. Ms. Hobson successfully pulled away and then began to swing her fist and kick at Officer Alisankus. Ms. Hobson's fist struck Officer Alisankus on the left cheek. Ms. Hobson also kicked Officer Alisankus in the left leg and right forearm. Officer Alisankus was later treated at Beloit Memorial Hospital for injuries sustained during this incident. . . .

On January 2, 1996 the circuit court conducted an evidentiary hearing. . . . The court dismissed the obstructing and resisting counts, finding no probable cause for Ms. Hobson's arrest. The circuit court also concluded that Ms. Hobson had a common law privilege to forcibly resist

her arrest. In the circuit court's view, a "superior social policy is advanced by a rule which modifies the common law rule so as to not permit resistance to an unlawful arrest unless the health or safety of the individual or a member of his or her family is threatened in a way that is not susceptible of cure later in a court room." . . . The circuit court concluded that the battery charge was incident to the unlawful arrest, and that Ms. Hobson had no intent to assault an officer, but that the police officer assaulted her. The circuit court then dismissed the entire complaint. . . .

Issue

This court is faced with two questions. First, we must ascertain whether a common law privilege to forcibly resist unlawful arrest, in the absence of unreasonable force, has existed in Wisconsin until now. Second, if that privilege exists, we must decide whether public policy is best served by continuing to recognize that privilege, or by abrogating it.

Reasoning

Article XIV, section 13 of the Wisconsin Constitution preserves the English common law in the condition in which it existed at the time of the American Revolution until modified or abrogated. Article XIV of the Wisconsin Constitution provides: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

American courts adopted the English common law rule that unlawful arrest was a justified provocation to resist with physical force. American common law broadly recognized a privilege to forcibly resist an unlawful arrest throughout the nineteenth and twentieth centuries. . . . Nothing in our statutes or case law demonstrates that this common law privilege has been, until now, modified or abrogated. . . .

Against this historical backdrop, we turn to the second question confronting us. Is public policy best served by continuing to recognize the common law privilege to use physical force to resist an unlawful arrest, or by abrogating it? . . . The overall trend has been toward abrogation of the right. Treatment of this issue by the American Law Institute [ALI] represented a turning point in the evolution of this right. After significant debate, the ALI in 1958 promulgated a version of the Model Penal Code abrogating the right, and declaring "the use of force is not justifiable . . . to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful." . . . The ALI comment in support of this section asserts that it "should be possible to provide adequate remedies against illegal arrest, without permitting the arrested person to resort to force—a course of action highly likely to result in greater injury even to himself than the detention." . . . Judge Learned Hand succinctly characterized the risk of continuing the right, "the idea that you may resist peaceful arrest . . . because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine [lawfulness], . . . [is] not a blow for liberty but on the contrary, a blow for attempted anarchy." . . .

In a day when police are armed with lethal and chemical weapons, and possess scientific communication and detection devices readily available for use, it has become highly unlikely that a suspect, using reasonable force, can escape from or effectively deter an arrest, whether lawful or unlawful. His accomplishment is generally limited to temporary evasion, merely rendering the officer's task more difficult or prolonged. Thus self-help as a practical remedy is anachronistic, whatever may have been its original justification or efficacy in an era when the common law doctrine permitting resistance evolved.

Today, with few exceptions, arrests are made by police officers, not civilians, and when a citizen is arrested, his probable fate is neither bail nor jail, but release after a short detention in a police station. . . . The common law right to forcibly resist unlawful arrest developed out of necessity in response to circumstances of an absence of bail, illness, physical torture and other great dangers . . . With those dire possibilities and no viable judicial or administrative redress, forcibly resisting an unlawful arrest was the only effective option a citizen had. But circumstances have changed. Unhealthy conditions in jails have decreased, while the physical risks of resisting arrest have increased. When the law of arrest developed, resistance to an arrest by a peace officer did not involve the serious dangers it does today. . . . Today, every peace officer is armed with a pistol and has orders not to desist from making an arrest though there is forceful resistance. . . .

Not only is forcible resistance now a substantially less effective response to unlawful arrest, there are many safeguards and opportunities for redress. No longer must individuals languish for years in disease-ridden jails. Now, bail is available. No longer are individuals detained indefinitely on dubious charges. Now, prompt arraignment and determination of probable cause are mandated. . . . No longer must individuals violently resist to prevent the fruits of an unlawful arrest from being used to prosecute them. Now, the exclusionary rule is in operation. . . . No longer must unlawful police action go undetected or undeterred. Now there are internal review and disciplinary procedures in police departments. No longer must patterns of police misconduct go unchecked. Now, civil remedies and injunctions are available.

Holding

In sum, the majority of jurisdictions have concluded that violent self-help is antisocial and unacceptably dangerous. We agree that there should be no right to forcibly resist an unlawful arrest in the absence of unreasonable force. When persons resist arrest, they endanger themselves, the arresting officers, and bystanders. Although we are sympathetic to the temporary deprivation of liberty the individual may suffer, the law permits only a civilized

form of recourse. We disagree . . . that our holding "will have imposed a rule that forbids the individual to resist the sovereign's own wrongs. . . ." Justice can and must be had in the courts, not in the streets. . . . We adopt the conclusion reached by the Supreme Court of Alaska that "[o]ur rules of law should discourage the unnecessary use of physical force between man and man. Any rule which promotes rather than inhibits violence should be re-examined. Along with increased sensitivity to the rights of the criminally accused there should be a corresponding awareness of our need to develop rules which facilitate decent and peaceful behavior by all." . . . It is not too much to ask that one believing himself unlawfully arrested should submit to the officer and thereafter seek his legal remedies in court. Such a rule helps to relieve the threat of physical harm to officers who in good faith but mistakenly perform an arrest, as well as to minimize harm to innocent bystanders." . . .

We hold that a private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether the arrest is illegal . . . accordingly, we hold that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest, but based on public policy concerns, we hereby abrogate that privilege. . . . We affirm the circuit court's order dismissing the charges against Ms. Hobson. . . .

Concurring, *Abrahamson, C.J.*

The circuit court correctly found that "the officer had no authority to take a citizen who refuses to be interviewed to the police station to compel an interview there, especially a five-year-old boy." Wisconsin statutes provide that if an officer has probable cause to believe that a child under the age of twelve has committed an offense, the officer must immediately make every reasonable effort to release the child to a parent. . . . In this case the parent was present when the officer approached the child; yet the officer sought to remove the child from the parent's charge.

The officer then decided to arrest the mother. The circuit court correctly concluded that there was no lawful basis for the mother's arrest. No one disputes this conclusion.

In a careful and scholarly examination of the same legal authorities relied upon by the majority opinion, the circuit court concluded that the mother's right to resist the unlawful arrest should be protected. The circuit court made plain that it was deeply offended by the officer's conduct in this incident. In the hearing on the motion to dismiss, the circuit court expressed its dismay: "They took this kid down there because they were hacked off because she wouldn't let them interview the child at her home. . . . When have you ever heard of them arresting a five-year-old and taking them into custody because they believe that a bicycle had been stolen? . . ." Further, the circuit court wrote, "Nothing would permit the officer to take a five-year-old child to a police station for a junior version of the 'third degree.'"

The common law right to resist an unlawful arrest was not designed to foster resistance to law enforcement officers or to encourage people to disobey them. Instead the common law right to resist unlawful arrest was designed to protect a person provoked by a wrongful arrest from being criminally charged with obstructing an officer. . . .

The circuit court found that Ms. Hobson "clearly used only force sufficient to attempt to prevent her illegal arrest. . . . There is a complete absence of an intent to assault an officer. Her only evident intent was to prevent her illegal arrest. She did not assault the police officer; the police officer assaulted her." . . . A person is unlawfully arrested and is provoked to anger and emotion to resist the unlawful arrest. Under such circumstances, according to the common law, the person wrongfully arrested should not be subject to criminal prosecution. . . .

As the circuit court wrote, "it is difficult to imagine a mother who would allow her five-year-old son to be dragged off to the station house and subjected to an illegal interrogation. It certainly would be hollow to suggest that she submit to that process and then argue about it in court after whatever harm to the child will have already occurred. The circumstances under which an individual should be allowed to resist an unlawful arrest are narrow. This case represents one of those exceptions. . . ."

Questions for Discussion

1. Why was Ms. Hobson's arrest illegal?
2. Discuss the reason for the common law English rule recognizing the right to resist a lawful arrest. Distinguish this from the American rule. Why does the Wisconsin Supreme Court adopt the American rule? Are you persuaded that the English rule is "outdated" and "unworkable?" Contrast the views of a majority of the judges on the Wisconsin Supreme Court with the sentiments expressed by Chief Justice Abrahamson.
3. The case against Ms. Hobson was dismissed. The Wisconsin Supreme Court, however, ruled that the American rule would be the law for all future cases involving resistance to the police. Why did the court decide to apply the American rule only in the future?
4. Should the issue of whether to adopt the English or the American rule be a matter for the judges of the Wisconsin Supreme Court or the elected state legislature?
5. Why have courts abandoned the right to resist an unlawful arrest, although they continue to recognize the right to use proportionate physical force against a police officer's employment of excessive and unnecessary force?

Necessity

The **necessity defense** recognizes that conduct that would otherwise be criminal is justified when undertaken to prevent a significant harm. This is commonly called "the **choice of evils**" because individuals are confronted with the unhappy choice between committing a crime or experiencing a harmful event. The harm to be prevented was traditionally required to result from the forces of nature. A classic example is the boat captain caught in a storm who disregards a "no trespassing sign" and docks his or her boat on an unoccupied pier. Necessity is based on the assumption that had the legislature been confronted with this choice, the legislators presumably would have safeguarded the human life of sailors over the property interest of the owner of the dock. As a result, elected officials could not have intended that the trespass statute would be applied against a boat captain confronting this situation.[52]

English common law commentators and judges resisted recognition of necessity. The eighteenth-century English justice Lord Hale objected that recognizing starvation as a justification for theft would lead servants to attack their masters. Roughly one hundred years later, English historian J.F. Stephen offered the often-cited observation that "[s]urely it is at the moment when temptation to crime is the strongest that the law should speak most clearly and emphatically to the contrary."[53]

In 1884, English judges confronted what remains the most challenging and intriguing necessity case in history, *The Queen v. Dudley and Stephens*. The three crew members of the yacht, the *Mignonette,* along with the seventeen-year-old cabin boy, were forced to abandon ship when a wave smashed into the stern. The four managed to launch a thirteen-foot dinghy with only two tins of turnips to sustain them while they drifted sixteen hundred miles from shore. On the fourth day, they managed to catch a turtle that they lived on for a week; they quenched their thirst by drinking their own urine and, at times, by drinking seawater. On the nineteenth day, Captain Thomas Dudley murdered young Richard Parker with the agreement of Edwin Stephens and over the objection of Edmund Brooks. The three only survived by eating Parker's flesh and drinking his blood until rescued four days later. The English court rejected the defense of necessity and the proposition that the members of the crew were justified in taking the life of Parker in order to survive. Lord Coleridge asked, "[b]y what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? . . . It is . . . our duty to declare that the prisoners' act in this case was willful murder. . . . [T]he facts . . . are no legal justification of the homicide. . . ."[54] The defendants were sentenced to death, but released within six months.[55]

The limitation of necessity to actions undertaken in response to the forces of nature has been gradually modified, and most modern cases arise in response to pressures exerted by social conditions and events. *State v. Salin* is representative of this trend. Salin, an emergency medical services technician, was arrested for speeding while responding to a call to assist a two-year-old child who was not breathing. The Delaware court agreed that Salin reasonably assumed that the child was in imminent danger and did not have time to use his cell phone to check on the child's progress. His criminal conviction was reversed on the grounds of necessity. Judge Charles Welch concluded that Salin was confronted by a choice of evils and that his "slightly harmful conduct" was justified in order to "prevent a greater harm."[56]

There are several reasons for the defense of necessity:[57]

- *Respect*. Punishing individuals under these circumstances would lead to disrespect for the legal system.
- *Equity*. Necessity is evaluated on a case-by-case basis and introduces flexibility and fairness into the legal system.

The necessity defense nevertheless remains controversial and subject to criticism:[58]

- *Self-Help*. Individuals should obey the law and should not be encouraged to violate legal rules.
- *Mistakes*. Society suffers when an individual makes the wrong choice in the "choice of evils."
- *Politicalization of the Law*. The defense has been invoked by antiabortion and antinuclear activists and individuals who have broken the law in the name of various political causes.
- *Irrelevancy*. Relatively few cases arise in which the necessity defense is applicable and too much time is spent debating a fairly insignificant aspect of the criminal law.

Roughly one-half of the states possess necessity statutes and the other jurisdictions rely on the common law defense of necessity. There is agreement on the central elements of the defense.[59]

- *There Was An Immediate and Imminent Harm.* In *State v. Green,* the defendant was assaulted and twice sodomized in his cell. He pretended to commit suicide on two occasions so as to be removed from his cell, but was informed that he would have to "fight it out, submit to the assaults or go over the fence." Three months later he was threatened with sexual assaults by five inmates and escaped from prison. The Missouri Supreme Court ruled that the trial court properly denied Green the defense of necessity because "[t]his is not a case where defendant escaped while being closely pursued by those who sought by threat of death or bodily harm to have him submit to sodomy."[60]
- *The Defendant Also Must Not Have Been Substantially at Fault in Creating the Emergency.* In *Humphrey v. Commonwealth,* the Virginia Court of Appeals recognized that the defendant, a convicted felon, was justified in violating a gun possession statute in an effort to protect himself from an armed attack. The court stressed that the appellant was "without fault in provoking the altercation."[61]
- *The Harm Created by the Criminal Act Is Less Than That Caused by the Harm Confronting the Individuals.* Dale Nelson's truck became bogged down in a marshy area roughly 250 feet from the highway. He was fearful that the truck might topple over, and he and two companions unsuccessfully sought to free the vehicle. A passerby drove Nelson to the Highway Department yard where he ignored No Trespassing signs and removed a dump truck that also became stuck. He returned to the heavy equipment yard and took a front-end loader that he used to remove the dump truck. He freed the dump truck, but both the front-end loader and truck suffered substantial damage. Nelson was ultimately convicted of the reckless destruction of personal property and joyriding. The Alaska Supreme Court ruled that "the seriousness of offenses committed by Nelson were disproportionate to the situation he faced." Nelson's "fears about damage to his truck roof were no justification for his appropriation of sophisticated and expensive equipment."[62]
- *An Individual Reasonably Expected a Direct Causal Relationship Between His Acts and the Harm to Be Averted.* In *United States v. Maxwell,* the First Circuit Court of Appeals dismissed the defendant's contention that he could have reasonably believed that disrupting military exercises at a naval base would cause the U.S. Navy to withdraw nuclear submarines from the coast of Puerto Rico. The court ruled that this was "pure conjecture" and that the defendant "could not reasonably have anticipated that his act of trespass would avert the harm that he professed to fear." Political activists have been equally unsuccessful in contending that they reasonably believed that acts such as splashing blood on walls of the Pentagon or the vandalizing of government property would impede the United States' production of military weaponry.[63]
- *There Were No Available Legal Alternatives to Violating the Law.* The District of Columbia Court of Appeals confirmed the conviction of a defendant charged with the unlawful possession of marijuana where the defendant failed to demonstrate that she had tried the dozens of drugs commonly prescribed to alleviate her medical condition.[64] Necessity also was not considered to justify the kidnapping and "deprogramming" of a youthful member of the Unification Church. The Colorado Court of Appeals explained that even assuming that the young woman confronted an imminent harm from a religious cult, her Swedish parents might have pursued legal avenues such as obtaining a court order institutionalizing the twenty-nine-year-old church member as an "incapacitated or incompetent person."[65]
- *The Criminal Statute That Was Violated Does Not Preclude the Necessity Defense.* Courts examine the text or legislative history of a statute to determine whether the legislature has precluded a defendant from invoking the necessity defense. There is typically no clear answer, and judges often ask whether the legislature would have recognized that the statute may be violated on the grounds of necessity under the circumstances. In *United States v. Oakland Cannabis Buyers' Cooperative,* U.S. Supreme Court Justice Clarence Thomas ruled that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act."[66] In *United States v. Romano,* Romano was bloodied and battered and fleeing the scene of a fight when stopped by a police officer and charged with DWI (driving while intoxicated). A New Jersey superior court ruled that the state legislature did not preclude

the necessity defense in those cases in which an intoxicated driver was fleeing a brutal and possibly deadly attack.[67]

The next case, *State v. Caswell,* presents the issue of whether a woman who was sexually assaulted confronted an immediate threat of injury or harm that justified her driving while extremely inebriated. Pay particular attention as to whether Caswell confronted an "imminent harm" and whether it was "necessary" for her to drive while drunk. *Caswell* also presents the perennial problem of determining the credibility of a defendant's testimony.

Model Penal Code

Section 3.02. Justification Generally: Choice of Evils

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
   (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
   (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
   (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evil or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Analysis

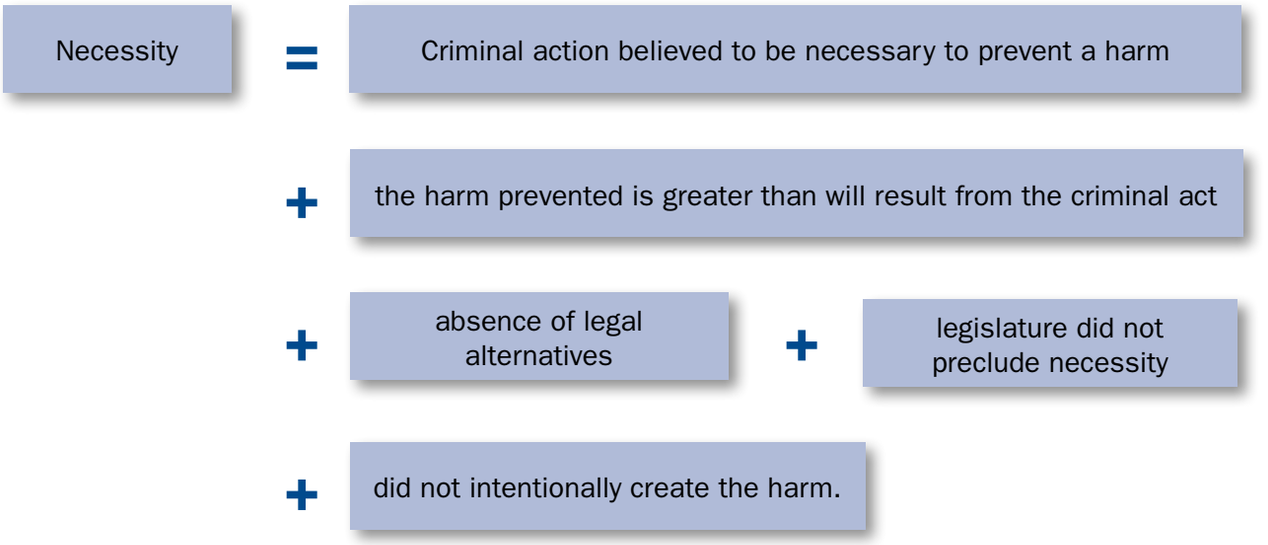
The commentary to the Model Penal Code observes that the letter of the law must be limited in certain circumstances by considerations of justice. The commentary lists some specific examples:

1. Property may be destroyed to prevent the spread of a fire.
2. The speed limit may be exceeded in pursuing a suspected criminal.
3. Mountain climbers lost in a storm may take refuge in a house or seize provisions.
4. Cargo may be thrown overboard or a port entered to save a vessel.
5. An individual may violate curfew to reach an air-raid shelter.
6. A druggist may dispense a drug without a prescription in an emergency.

Several steps are involved under the Model Penal Code:

- *A Belief That Acts Are Necessary to Avoid a Harm.* The actor must "actually believe" the act is necessary or required to avoid a harm or evil to himself or to others. A druggist who sells a drug without a prescription must be aware that this is an act of necessity rather than ordinary law breaking.
- *Comparative Harm or Evils.* The harm or evil to be avoided is greater than that sought to be prevented by the law defining the offense. Human life generally is valued above property. A naval captain may enter a port from which the vessel is prohibited to save the life of a crew member. On the other hand, the possibility of financial ruin does not justify the infliction of physical harm. The question of whether an individual has made the proper choice is determined by the judge or jury rather than by the defendant's subjective belief.
- *Legislative Judgment.* A statute may explicitly preclude necessity; for instance, prohibiting abortions to save the life of the mother.
- *Creation of Harm.* An individual who intentionally sets a fire may not later claim necessity. However, an individual who negligently causes a fire may still invoke necessity to destroy property to control the blaze. He or she may be prosecuted for causing the fire.

The Legal Equation



The Statutory Standard

The Model Penal Code provision is followed by more than twenty states. Compare the Model Penal Code to the Wisconsin statute:

Wisconsin Statutes Section 939.47. Necessity

Pressure of natural forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to second-degree intentional homicide.

Another approach is illustrated by the complex New York statute. Note the prohibition of the reliance on necessity by individuals motivated by social and political considerations.

New York Penal Law Section 35.05. Justification; Generally

Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:

(1) . . .

(2) Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not result upon considerations pertaining only to the morality and advisability of the statute . . . [T]he court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

Was Caswell entitled to the defense of necessity in fleeing a sexual attacker?

STATE v. CASWELL, *771 A.2D 375 (ME. 2001), OPINION BY: ALEXANDER, J.*

Patricia Caswell appeals from a judgment entered in the Superior Court (Kennebec County, Atwood, J.) following a jury trial convicting her of a third offense of operating under the influence. The operating under the influence charge was a Class D offense . . . with two prior convictions as aggravating factors. . . . We affirm.

Upon conviction, the Superior Court sentenced Caswell to six months in the county jail, all but thirty days suspended with probation for one year, a fine of $1,000, and a four-year suspension of her driver's license and registration privileges. . . . [T]he thirty days' jail time, the $1,000 fine, and the four-year suspension of driving privileges were mandatory minimums for conviction of a third offense of operating under the influence.

Facts

Maine Revised Statutes Annotated title 17-A, section 103(1) reads as follows: "Conduct which the actor believes to be necessary to avoid imminent physical harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the crime charged."

On August 1, 1996, Caswell and a man with whom she had had a prior intimate relationship spent the evening drinking alcoholic beverages at bars in the Augusta area. Although the couple was using Caswell's vehicle, the man was driving because Caswell had just regained her driving privileges and did not want to drive after consuming alcohol.

As the evening progressed, Caswell testified that she began asking the man to take her home because she had to work the next day. Caswell testified that the man was drunk and angry and that he refused to take her home, ultimately taking her to his residence instead. Once at the residence, Caswell testified that she began to walk away. However, her companion followed her in her vehicle and demanded that she get in and return to the residence. Caswell testified that she consented to get in and return to the residence because she was afraid. Caswell testified that she then agreed to have sexual intercourse with the man because she believed that she was not going to get home until she did. During the course of the sexual encounter, Caswell testified that she was forced to engage in several degrading sexual acts which she resisted. Ultimately, she pushed the man off her and left the residence.

Caswell testified that when she left, her attacker was lying on the bed, that she did not know whether or not he was passed out, and that she did not recall him saying anything to her as she left. Caswell also testified that she did not know whether or not the man would follow her, but that she was afraid he was going to "get a hold" of her again.

After leaving the residence, Caswell drove her vehicle to an Irving station in Augusta. There she stopped, entered the station, and purchased a package of cigarettes. Although she stopped, Caswell testified at trial that she thought that her attacker was following her. When she stopped, Caswell also saw two Augusta police officers parked at the Irving station. She did not approach the officers. Caswell testified that she was not about to tell two strange officers what had happened to her and that she would have approached the officers only if she had seen her attacker coming toward her while she was at the Irving station.

Officer Struk of the Augusta Police Department was one of the officers in the Irving parking lot. He saw Caswell's pickup truck pull rapidly into the parking lot and shortly thereafter leave at a high rate of speed. He followed Caswell's truck in his cruiser and estimated that it was traveling at approximately sixty-five mph in a forty-five-mph zone. He signaled Caswell to stop and she did. When Officer Struk approached Caswell and requested her license and registration, he saw that she was crying, and he detected a strong odor of alcoholic beverages. Caswell informed Struk that she had just broken up with her boyfriend and admitted that she had been drinking. Caswell slipped on the . . . running board when she exited and performed poorly on field sobriety tests. Struk took Caswell to the Augusta police station where a breathalyzer test indicated a blood-alcohol level of .12 percent. Caswell was summonsed for operating under the influence. Maine law prohibits operating a motor vehicle while under the influence of alcoholic beverages or while having a blood alcohol content of .08 percent or higher.

At trial, after the State rested and out of the presence of the jury, Caswell offered the testimony of a psychologist, Dr. Brian Rines, concerning the effects of the sexual attack which Caswell had told him had occurred. He asserted that because of the sexual attack, Caswell felt an "overwhelming need to escape," that her judgment was impaired, that it was rational for her to fear further assault, and that her emotions overrode her thought processes. Rines also testified that Caswell's unwillingness to report the sexual assault to the police officers at the Irving station was consistent with behavior of other sexual assault victims and that she was driven by a frantic need to get home. Rines indicated that Caswell viewed her home as a place of refuge, although from the evidence presented at

trial it was apparent that the man who Caswell testified had attacked her knew where her residence was located. Rines also testified that Caswell told him that she continued to fear further attack even after she left the Irving station and that, in Rines's experience, Caswell's fear was reasonable and consistent with that of other victims of sexual assault.

Following the testimony of Rines and Caswell, the court ruled that the facts presented did not generate the competing harms justification because there was no evidence of imminent harm to Caswell. Accordingly, Rines did not testify before the jury. The court permitted Caswell to testify to all of the events of the evening, including the sexual attacks. Although requested by the defense, the jury was not instructed on the competing harms justification. After the jury returned a guilty verdict and the court entered judgment, Caswell filed this appeal.

Issue

The principal issue on appeal is whether the evidence was sufficient to generate the competing harms justification. There is a subsidiary issue of whether the court should have excluded the psychologist's testimony offered in support of the competing harms justification. Caswell argues that her subjective belief that a person who had attacked her might be chasing her is sufficient to generate a competing harms justification for her continuing to operate her motor vehicle . . . even after she had stopped for cigarettes at the Irving station and observed the police officers.

Reasoning

On this record, there is no evidence that Caswell was imminently threatened with physical harm. When she left her attacker, Caswell testified that he was lying on a bed, that she did not know whether or not he was passed out, and that she did not recall him saying anything to her as she left. Beyond Caswell's testimony, the record contains absolutely no evidence that the person whom Caswell asserted had attacked and degraded her was chasing her. Further, on the particular facts of this case, any justification for driving while under the influence in order to flee from the attacker's residence evaporated when Caswell stopped for cigarettes and observed the Augusta police officers.

Holding

Caswell's argument would have us change the law regarding competing harms to (1) eliminate the requirement that the evidence demonstrate, as a fact, that physical harm was imminently threatened and (2) allow a subjective belief that one is being pursued, without more, to become an excuse for operating under the influence or any other crime that may be subject to a competing harms justification.

We decline Caswell's invitation to change the law to allow subjective beliefs alone to generate the competing harms justification. Based on our prior precedent, the trial court correctly ruled that the competing harms justification would be excluded because there was no evidence which, even construed most favorably to Caswell, suggesting that physical harm to her was imminently threatened.

Concurring, *Saufley, J.,* with whom *Danna, J.,* joins

If we accept Caswell's testimony on these facts . . . we would have to conclude that she presented all of the elements necessary to generate the competing harms defense, had she been stopped while driving away from her attacker.

Because she was not stopped at that point, however, the analysis does not end there. When Caswell arrived at the Irving station, the facts supporting her competing harms defense changed significantly. She was no longer faced with an impossible situation, where she had to decide between staying with the man who had just sexually assaulted her, or fleeing from her attacker by driving under the influence. By the time she had reached the Irving station, Caswell was away from her attacker's presence, in a public place, and in the presence of other people, including two uniformed police officers. At the same time, there was no evidence whatsoever that her attacker had, in fact, followed her. Moreover, once she reached the public area of the Irving station, she also had alternative methods of getting home. . . . She could have, for example, called a taxi to take her home.

When she chose, instead, to get back into her truck and drive home under the influence, she did so without the justification that initially existed when she left her attacker's trailer. In other words, she was no longer in the isolated setting where her only reasonable option was to violate the law. A defense that is valid initially may be lost by a change in circumstances. . . .

Dissenting, *Calkins, J.*

I strongly disagree with the assertion in the majority opinion that allowing the competing harms defense in this case would do away with the requirement that physical harm be imminently threatened and would create a change in the law eliminating all requirements of the competing harms defense except the subjective belief of the defendant. If Caswell's testimony was only that she believed she was being followed, and if there was no evidence that she had been followed and raped shortly before her conduct that led to her detention by the police, then the assertion in the opinion would be correct. However, here we have significant evidence that makes the existence of the imminent threat more than subjective; the evidence is sufficient to demonstrate the reasonable and factual existence of an imminent threat.

I also write separately to address the issue of the admissibility of Dr. Rines's testimony. His testimony was admissible because it was relevant to the issue of whether Caswell had a reasonable alternative to driving. . . . Dr. Rines's testimony was that because Caswell was suffering

from rape trauma, she was not acting as logically as someone who had not been raped might have acted. The fact that Caswell did not want to talk to the officers about what had just transpired was consistent with the actions of other rape victims. Because the lack of a reasonable alternative is an element of the defense, its existence is a fact of consequence. Dr. Rines's testimony was, therefore, relevant and should have been admitted.

A jury, upon hearing all of the evidence and upon being given a competing harms instruction, may have decided that the State had disproven the existence of the competing harm. It could have chosen not to believe that Caswell was raped or that she was afraid her rapist was following her. Perhaps the jury would have concluded that Caswell had a reasonable alternative. Caswell's jury, however, was not given the opportunity to determine the viability of the competing harms defense. In my opinion, the evidence . . . was sufficient to put the competing harms defense in issue, and the jury should have been given the opportunity to decide it.

Questions for Discussion

1. Do the judges differ in regard to the imminence of the harm confronting Caswell? Note that the statute uses a subjective or "believes" standard for "imminence." The Maine Supreme Judicial Court interpreted this as requiring both a subjective belief and objective facts supporting the defendant's belief that she confronted an imminent harm or injury.
2. The court did not address whether the legislature precluded the necessity defense for DWI. Do you believe that the Maine legislature would have endorsed Caswell's driving while inebriated under these conditions?
3. Did Caswell's drinking contribute to the creation of the very harm she was attempting to escape? Should she be entitled to rely on necessity?
4. Why did Caswell fail to approach the police when she stopped for cigarettes and then drive at an excessive rate of speed and tell the officer that she was crying because she had broken-up with her boyfriend? Does the court have difficulty understanding the complex human response of a victim of sexual assault? Do you question Caswell's credibility?
5. In your opinion, should Caswell have been given the opportunity to present the defense of necessity to the jury? Should she have been acquitted on the grounds of necessity?

Cases and Comments

1. ***Imminence.*** Steven Gomez was about to be released from prison in March 1992, when he was approached by a fellow inmate, Imran Mir, who was waiting trial on involvement in an international drug conspiracy. Mir solicited Gomez to murder six witnesses in Mir's case and offered $10,000 or half a kilogram of heroin for each witness Gomez killed. Gomez contacted government authorities and agreed to assist in gathering evidence against Mir. Mir provided Gomez with the names of the individuals to be killed, promised to supply the required weapons, and provided a $1,000 down payment. The government subsequently charged Mir with five counts of solicitation to commit murder. The indictment against Mir revealed Gomez's identity as the informant in the case.

In October 1992, Gomez was stopped by a man with a gun who threatened to kill him, and Gomez later learned that there was a contract out on his life. Gomez unsuccessfully sought assistance from U.S. Customs, which had promised him protection; his parole officer; the Sacramento County Sheriff; and Catholic and Protestant churches. He even resorted to detailing his plight in an interview with a local newspaper.

Gomez was scared and started sleeping in the park, living on the streets, spending the night at the homes of friends, and riding buses all night. At one point, he intentionally violated parole and during his month-long incarceration received a written threat. On February 1, 1993, one of his friends received a death threat meant for Gomez. Gomez reacted by arming himself with a 12-gauge shotgun. On February 4, 1993, two days after Gomez began carrying a weapon, he was arrested by Customs agents and was charged with possession of a firearm by a felon.

The Ninth Circuit Court of Appeals held that the threat against Gomez was more than a vague promise of future harm; Gomez possessed good reason to believe that Mir would seek retribution because his hiring of Gomez substantiated that he was willing to kill witnesses. Gomez confronted an international drug cartel boss who posed a danger that satisfied the "present and immediate" requirement of the necessity defense. The Ninth Circuit also noted that it was the government's filing of an indictment against Mir, rather than Gomez's behavior, that placed Gomez in this precarious position.

Gomez exhausted reasonable alternatives before arming himself and could not leave California and join his wife and son in Texas while on parole. In any event, Mir clearly possessed the resources to track down Gomez in Texas. Gomez also possessed a network of family and friends in California who assisted in hiding him from Mir. In short, there were few alternatives available to Gomez other than arming himself.

There was no indication that Gomez armed himself with a shotgun for any purpose other than self-defense.

Gomez immediately dropped the firearm when confronted with customs agents to demonstrate his cooperation. The Ninth Circuit Court of Appeals concluded that the prosecution of Gomez for "trying to protect himself, when the government refused to protect him from the consequences of its own indiscretion, is not what we would expect from a fair-minded sovereign." How would you rule? See *United States v. Gomez,* 92 F.3d 770 (9th Cir. 1996).

2. ***Property Versus Human Life.*** In *State v. Celli,* defendants Brooks and Celli left Deadwood, South Dakota, in search of employment in Newcastle, Wyoming, a distance of roughly seventy-five miles. They planned to hitchhike in the sunny but chilly weather and dressed warmly. The two defendants failed to secure a ride and by late afternoon had walked roughly twelve miles. Celli slipped in the snow along the road and grabbed Brooks, and the two then tumbled down a steep embankment. In an effort to get back to the road, they were forced to cross a frozen stream and fell through the ice. Their shoes and pants were soaked. The temperature quickly dropped to below freezing and they unsuccessfully attempted to hitch a ride back to Deadwood. Brooks and Celli began the trek back and when they spotted a cabin, they broke the lock on the front door and found matches to start a fire with which to dry their clothes. They spent the night in the bed and, in the morning, shared a can of beans. A neighbor noticed the smoke and notified the police. The South Dakota Supreme Court reversed their conviction on fourth-degree burglary on a technicality and found it unnecessary to reach the issue whether the two were entitled to an instruction on the necessity defense. Were the defendants justified in breaking into the cabin and spending the night? See *State v. Celli,* 263 N.W.2d 145 (S.D. 1978).

See more cases on the study site: The Queen v. Dudley and Stephens, *www.sagepub.com/lippmanccl2e*

You Decide

8.7 Matthew Ducheneaux was charged with possession of marijuana. He was arrested on a bike path in Sioux Falls, South Dakota, during the city's annual "Jazz Fest" in July 2000. He falsely claimed that he lawfully possessed the two ounces of marijuana as a result of his participation in a federal medical research project. Ducheneaux is thirty-six and was rendered quadriplegic by an automobile accident in 1985. He is almost completely paralyzed other than some movement in his hands. Ducheneaux suffers from spastic paralysis that causes unpredictable spastic tremors and pain throughout his body. He testified that he had not been able to treat the symptoms with traditional drug therapies and these protocols resulted in painful and potentially fatal side effects. One of the prescription drugs for spastic paralysis is Marinol, a synthetic tetrahydrocannabinol (THC). THC is the essential active ingredient of marijuana. Ducheneaux has a prescription for Marinol, but testified it causes dangerous side effects that are absent from marijuana. The South Dakota legislature has provided that "no person may knowingly possess marijuana" and has declined on two occasions to create a medical necessity exception. Would you convict Ducheneaux of the criminal possession of marijuana? The statute provides that the justification defense is available when a person commits a crime "because of the use or threatened use of unlawful force upon him or upon another person." See *State v. Ducheneaux,* 671 N.W.2d 841 (S.D. 2003).

You can find the answer at www.sagepub.com/lippmanccl2e

Consent

For an international perspective on this topic, visit the study site.

The fact that an individual consents to be the victim of a crime ordinarily does not constitute a defense. For example, the Massachusetts Supreme Judicial Court held that an individual's consensual participation in a sadomasochistic relationship was not a defense to a charge of assault with a small whip. The Massachusetts judges stressed that as a matter of public policy, an individual may not consent to become a victim of an assault and battery with a dangerous weapon.[68]

Professor George Fletcher writes that although an individual is not criminally responsible for self-abuse or for taking his or her own life, those who assist him or her are criminally liable. Why does consent not constitute a justification?[69]

The most common explanation is that the criminal law punishes acts against individuals that harm and threaten society. The fact that an individual may consent to a crime does not mean that society does not have an interest in denouncing and deterring this conduct. The famous eighteenth-century English jurist William Blackstone observed that a criminal offense is a "wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed."[70]

- Condoning a crime under such circumstances undermines the uniform application of the law and runs the risk that perpetrators will become accustomed and attracted to a life of crime.

- A sane and sensible person would not consent to being a victim of a crime.
- The victim's consent could not possibly constitute a reasonable and rational decision and may be the result of subtle coercion. Society must step in under these circumstances to insure the safety and security of the individual.
- The perpetrator of a crime can easily claim consent and courts do not want to unravel the facts.

In *State v. Brown,* a New Jersey Superior Court ruled that a wife's instructions to her husband that he was to beat her in the event that she consumed alcoholic beverages did not constitute a justification for the severe beating he administered. Judge Bachman ruled that to "allow an otherwise criminal act to go unpunished because of the victim's consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law."[71]

There are three exceptions or situations in which the law recognizes consent as a defense to criminal conduct:

- *Incidental Contact.* Acts that do not cause serious injury or harm customarily are not subject to criminal prosecution and punishment. People, for example, often are bumped and pushed on a crowded bus or at a music club.
- *Sporting Events*. Ordinary physical contact or blows are incident to sports such as football, boxing, or wrestling.
- *Socially Beneficial Activity.* Individuals benefit from activities such as medical procedures and surgery.

Consent must be free and voluntary and may not be the result of duress or coercion. An individual may also limit the scope of consent by, for instance, only authorizing a doctor to operate on three of the five fingers on his or her left hand.

- *Legal Capacity.* Young people below the age of consent, the intoxicated, and those on drugs, as well as individuals suffering from a mental disease or abnormality, are not considered capable of consent.
- *Fraud or Deceit.* Consent is not legally binding in those instances in which it is based on a misrepresentation of the facts.
- *Forgiveness*. The forgiveness of a perpetrator by the victim following a crime does not constitute consent to a criminal act.

A Nassau County court ruled that the defendants went beyond the consent granted by fraternity pledges to "hazing." The judge found that the intentional and severe beating administered exceeded the terms of any consent and observed that "consent obtained through fraud . . . or through incapacity of the party assaulted, is no defense. The consent must be voluntary and intelligent. It must be free of force or fraud. . . . [T]he act should not exceed the extent of the terms of consent."[72]

The next case in the chapter, *State v. Dejarlais,* involves a court order protecting a female against harassment by her former boyfriend. The case asks whether the victim's continuing consensual relationship with her boyfriend following the issuance of the order of protection constitutes a defense.

The Statutory Standard

The Montana Criminal Code provision vests considerable discretion in courts concerning the justification defense of consent.

Montana Code Annotated Section 45–2-211. Consent as a Defense

(1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;
(c) it is induced by force, duress, or deception; or
(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

Model Penal Code

Section 2.11. Consent

(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
   (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or
   (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
   (c) the consent establishes a justification of the conduct under Article 3 of the Code.

(3) Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:
   (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or
   (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmlessness of the conduct charged to constitute the offense; or
   (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or
   (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

Analysis

1. Section 2.11(1) notes that a lack of consent is an essential part of the definition of certain crimes that the prosecution must establish at trial beyond a reasonable doubt. Rape, for instance, requires a male's sexual penetration of a female without her consent.

2. Section 2.11(a)(b) repeats that consent constitutes a defense in the case of an offense causing minor injury or a foreseeable injury that occurs during a lawful sporting event. Section 2.11(2)(c) provides authorization for doctors to undertake emergency medical procedures on patients incapable of consent in those instances in which a reasonable person wishing to safeguard the welfare of the patient would consent.

3. There are four situations in which consent is not a defense under Section 211(3). The first involves an individual who is not entitled to consent, such as a stranger who consents to the "removal of another's property." The second covers a lack of personal capacity to consent. The third addresses an offense, such as the molestation or rape of a minor, in which the law seeks to protect individuals who are considered to be incapable of knowing and intelligently consenting. The last situation addresses consent obtained by fraud. A good example is a patient who consents to a medical procedure and after the administration of an anesthetic is sexually molested.

The Legal Equation

May the defendant raise the defense of consent to a violation of an order of protection?

State v. Dejarlais, *969 P.2D 90 (WASH. 1998), Opinion by: Dolliver, J.*

Defendant Steven Dejarlais was convicted in Pierce County Superior Court of violating a domestic violence order for protection. . . . The Court of Appeals affirmed the defendant's convictions, and we granted his petition for review. We now affirm.

Facts

Ms. Shupe met the defendant in 1993 after separating from her husband. She filed for divorce in June 1993 and began seeing the defendant regularly. Their relationship included his frequent overnight stays at her home. Ms. Shupe testified that, during divorce proceedings with her husband, a temporary parenting plan [the judge issued an order providing that Ms. Shupe and her husband were to share custody of the children until the issue of child custody was resolved] was filed, and she feared being found in violation of its terms because of her relationship with the defendant. She further testified her husband gave her $1,500 to help her move, and requested she petition for an order for protection against the defendant to avoid being found in violation of the parenting plan.

On September 9, 1993, Ms. Shupe signed a declaration in support of the request for a protection order, claiming she was a victim of defendant's harassment. She stated: "I met Steve back in February 1993. I'm married but going through a divorce. I decided to stop seeing him because it was becoming too much. He and my husband got into it a few times also. Steve follows me, calls numerous times a day, calls my work, comes to my work. He just don't get the hint it's over."

On September 23, 1993, an Order for Protection from Civil Harassment was entered [an order of protection issued by a Washington court is based on an allegation of domestic violence that includes physical harm or the fear of imminent physical harm or the stalking of one family or household member by another family or household member]. The Order restrained the defendant from contacting or attempting to contact Ms. Shupe in any manner, making any attempts to keep her under surveillance,

and going within "feet" of her residence and workplace. The order stated it was to remain in effect until September 23, 1994, and that any willful disobedience of its provisions would subject the defendant to criminal penalties as well as contempt proceedings. Police Officer Stephen Mauer served the defendant with the order on November 23, 1993. Ms. Shupe testified her relationship with the defendant continued despite the order.

The defendant went to jail in May 1994, apparently for an offense unrelated to his relationship with Ms. Shupe. During that time, Ms. Shupe discovered he had been seeing another woman. Following his stay in jail, on May 22, 1994, the defendant went to Ms. Shupe's home and let himself in through an unlocked door. Ms. Shupe, who had been asleep on the floor by the couch, confronted the defendant, telling him she knew about the other woman and wanted nothing more to do with him. She did not tell him to leave, fearing he would get "mad and furious," but walked back to her bedroom. The defendant followed her, saying he would "have [her] one more time." . . . He threw her on the bed, and, disregarding her protestations and refusals, had intercourse with her twice.

The defendant was arrested and charged with one count of violation of a protection order and one count of rape in the second degree. At trial, the defendant testified he was aware of the protection order and clearly understood its terms. He testified he did not rape Ms. Shupe but that the two of them had consensual sex.

The trial court declined to give defense counsel's proposed instruction, which stated: "If the person protected by a Protection Order expressly invited or solicited the presence of the defendant, then the defendant is not guilty of Violation of Protection Order." . . . Instead, the trial court instructed the jury as follows: "A person commits the crime of violation of an order for protection when that person knowingly violates the terms of an order for protection."

The jury found the defendant guilty of violation of a protection order and rape in the third degree. The Court of Appeals affirmed his convictions. We granted review and now affirm, holding consent is not a defense to the charge of violating a domestic violence order for protection.

The defendant was convicted of a misdemeanor violation of a protection order under RCW 26.50.110(1) which provides that whenever an order for protection is granted and the respondent or person to be restrained knows of the order, a violation of the restraint provisions or of a provision excluding the person from a residence, workplace, school, or day care is a gross misdemeanor.

Issue

The defendant contends that, where a person protected by an order consents to the presence of the person restrained by the order, the jury should be instructed that consent is a defense to the charge of violating that order. We note at the outset that, even if consent were a defense to the crime of violating a protection order, it is far from clear that the contact in this case was consensual. Contrary to the defendant's proposed instruction, Ms. Shupe does not appear to have invited or solicited the defendant's presence on the night in question. More importantly, the jury found defendant guilty of rape in the third degree. . . . The protection order prohibited any contact; even if Ms. Shupe consented to earlier contacts or to defendant's presence at her home that day, the rape was clearly a nonconsensual contact. We nevertheless reach the issue defendant raises because he seems to suggest that Ms. Shupe's repeated invitations and ongoing acquiescence to defendant's presence constituted a blanket consent or waiver of the order's terms. We disagree.

Reasoning

A domestic violence protection order does not protect merely the "private right" of the person named as petitioner in the order. In fact, the court recognized, the statute reflects the Legislature's belief that the public has an interest in preventing domestic violence. The Legislature has clearly indicated that there is a public interest in domestic violence protection orders. In its statement of intent for RCW 26.50, the Legislature stated that domestic violence, including violations of protective orders, is expressly a public, as well as private, problem, stating that domestic violence is a "problem of immense proportions affecting individuals as well as communities" which is at "the core of other social problems."

We agree. Indeed, the Legislature's intent is clear throughout the statute, and allowing consent as a defense is not only inconsistent with, but would undermine, that intent.

The order served on the defendant warned him "that any willful disobedience of the order's provisions would subject the respondent to criminal penalties and possibly contempt." We are convinced the Legislature did not intend for consent to be a defense to violating a domestic violence protection order.

The statute also requires police to make an arrest when they have probable cause to believe a person has violated a protection order. There is no exception to this mandate for consensual contacts; rather, the obligation to arrest does not even depend upon a complaint being made by the person protected under the order but only on the respondent's awareness of the existence of that order. . . .

Holding

Our reading of the statute is consistent with the Legislature's intent and clear statement of policy. Requests for modification of that policy should be directed to the Legislature not this court. The statute, when read as a whole, makes clear that consent should not be a defense to violating a domestic violence protection order. The defendant is not entitled to an instruction which inaccurately represents the law. We affirm the defendant's convictions.

Questions for Discussion

1. Why did Kimberly Shupe petition for an order of protection against Steven Dejarlais? Was it motivated by a desire to prevent Dejarlais from continuing to abuse or threaten her?
2. Shupe and Dejarlais continued their relationship for roughly six months following the order of protection. Why did Shupe suddenly complain that Dejarlais was violating the order?
3. Was there continuing consent by Kimberly Shupe to engage in a relationship with Dejarlais following the issuance of the order of protection? Should Dejarlais be able to use Shupe's continuing consent as a defense to his violation of the order of protection?
4. Does society have an interest in enforcing the order of protection that takes precedence over Shupe's consent to a continuing relationship with Dejarlais?

Cases and Comments

Sports. In *State v. Shelley,* Jason Shelley and Mario Gonzalez played on opposing teams during an informal basketball game at the University of Washington Intramural Activities Building. These games were not refereed and the players called fouls on opposing players. Gonzalez had a reputation for aggressive play and fouled Shelley several times. At one point, Gonzalez slapped at the ball and scratched Shelley's face and drew blood. Shelley briefly left and returned to the game. Shelley, after returning to the court, hit Gonzalez and broke his jaw in three places, requiring the jaw to be wired shut for six weeks. Shelley was convicted of assault in the second degree. Gonzalez testified that the assault was unprovoked. Shelley, however, contended that Gonzalez continually slapped and scratched him and that Shelley was getting increasingly angry. Shelley explained that the two went for a ball and claimed that Gonzalez raised his hand toward Shelley's face and that Shelley hit Gonzalez as a reflex reaction to protect himself from being scratched.

The Court of Appeals of Washington held that consent is a defense to assaults occurring as part of athletic contests. Absent this rule, most athletic contests would have to be prohibited. The court of appeals rejected the standard proposed by the prosecution that a victim cannot be considered to have consented to conduct that falls outside the rules of an athletic contest, explaining that various "excesses and inconveniences are to be expected beyond the formal rules of the game. . . . However, intentional excesses beyond those reasonably contemplated in the sport are not justified." The court of appeals adopted the Model Penal Code standard that "reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity are not forbidden by law." The issue is not the injury suffered by the alleged victim, but "whether the conduct of the defendant constituted foreseeable behavior in the play of the game. . . . [T]he injury must have occurred as a by-product of the game itself." The Court of Appeals of Washington affirmed Shelley's conviction and held that there is "nothing in the game of basketball" that would recognize consent as a defense to the conduct engaged in by Shelley. See *State v. Shelley,* 929 P.2d 489 (Wash. Ct. App. 1997).

Compare *Shelley* to *People v. Schacker.* In this New York hockey case, the defendant Robert Schacker struck Andrew Morenberg in the back of the neck after the whistle had blown and play had stopped. Morenberg was standing near the goal net and struck his head on the crossbar of the net, causing a concussion, headaches, blurred vision, and memory loss. This was a "no-check" hockey league that involved limited physical contact between opposing players. The District Court for Suffolk County dismissed the charges of assault in the third degree against Schacker based on the fact that Morenberg had assumed the risk of injury during the normal course of a hockey game.

Are the differing results in *Shelley* and *Schacker* based on the distinction between basketball and hockey? Is the judge in *Schacker* correct that Morenberg's injury was "connected with the competition"? See *People v. Schacker,* 670 N.Y.S.2d 308 (N.Y. Dist. Ct. 1998).

You Decide

8.8 Richard and Jose, two juveniles, were shooting at each other with BB guns. Jose was hit and lost his eye, and Richard was charged with third-degree assault. What would Richard argue in his defense? Would he be successful? See *State v. Hiott*, 987 P.2d 135 (Wash. 1999).

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

Justification defenses provide that acts that ordinarily are criminal are justified or carry no criminal liability under certain circumstances. This is based on the fact that a violation of the law under these conditions promotes important social values, advances the social welfare, and is encouraged by society.

Self-defense, for instance, preserves the right to life and bodily integrity of an individual confronting an imminent threat of death or serious bodily harm. Individuals are also provided with the privilege of intervening to defend others in peril. Defense of the dwelling preserves the safety and security of the home. The execution of public duties justifies the acts of individuals in the criminal justice system that ordinarily would be considered criminal. A police officer, for instance, may use deadly force against a "fleeing felon" who poses an imminent threat to the police or to the public. The right to resist an illegal arrest is still recognized in various states, but has been sharply curtailed based on the fact that the state and federal governments provide effective criminal and civil remedies for the abuse of police powers. Necessity or "choice of evils" justifies illegal acts that alleviate an imminent and greater harm. The defense of consent is recognized in certain isolated instances in which the defendant's criminal conduct advances the social welfare. These include incidental contact, sports, and medical procedures.

The justifiability of a criminal act is ultimately a matter for the finder of fact, either the judge or jury, rather than the defendant. The law generally requires that individuals relying on self-defense or necessity believe their acts are justified and that a reasonable person would find that the act is justified under the circumstances.

Chapter Review Questions

1. Distinguish the affirmative offenses of justification and excuse.
2. List the elements of self-defense. Explain the significance of reasonable belief, imminence, retreat, withdrawal, the castle doctrine, and defense of others.
3. What are the two approaches to intervention in defense of another? Which test is preferable?
4. What is the law pertaining to the defense of the home? Discuss the policy behind this defense. Compare the laws pertaining to defense of habitation and self-defense.
5. How does the rule regulating police use of deadly force illustrate the defense of execution of public duties? Does this legal standard "handcuff" the police?
6. Why have the overwhelming majority of states abandoned the defense of resistance to an illegal arrest? Distinguish this from the right to resist excessive force.
7. What are the elements of the necessity defense? Provide some examples of the application of the defense.
8. Why do most state legal codes provide that an individual cannot consent to a crime? What are the exceptions to this rule?
9. Write a brief essay outlining justification defenses.

Legal Terminology

affirmative defenses

aggressor

alter ego rule

American rule for resistance to an unlawful arrest

burden of persuasion

burden of production

case-in-chief

castle doctrine

choice of evils

deadly force

English rule for resistance to an unlawful arrest

excuses

fleeing felon rule

good motive defense

imperfect self-defense

intervention in defense of others

jury nullification

justification

make my day laws

misdemeanant

necessity defense

nondeadly force

objective test for intervention in defense of others

perfect self-defense

presumption of innocence

rebuttal

retreat

retreat to the wall

self-defense

stand your ground rule

tactical retreat

true man

withdrawal in good faith

Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read more about the events surrounding the Bernhard Goetz case and developments following the criminal trial. Would a jury acquit Goetz if he stood trial today?
2. Read about popular opposition to the duty to retreat in the law of self-defense. What is your view?
3. Watch a video of the police hot pursuit in *Scott v. Harris*.

Bibliography

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George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York: The Free Press, 1988). An analysis of the Bernhard Goetz case that explores the history and philosophical basis for self-defense.

Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (Chicago: University of Chicago Press, 1987), pp. 8–81. A thought-provoking discussion of the philosophical bases of the necessity defense.

Wayne R. LaFave, *Criminal Law,* 3rd ed. (St. Paul, MN: West Publishing, 2000), pp. 477–523. A comprehensive explanation of justification defenses with useful citations to the leading cases and law review articles.

Arnold H. Loewy, *Criminal Law in a Nutshell,* 4th ed. (St. Paul, MN: West Publishing, 2003), chap. 6. A short and precise summary of justification defenses.

Herbert L. Packer, *The Limits of the Criminal Sanction* (Palo Alto, CA: Stanford University Press, 1968), pp. 113–121. A brief but insightful discussion of the reasons for justification defenses.

9 Excuses

Was Nathaniel Brazill legally responsible for murdering his teacher?

On the last day of the 1999–2000 school year, thirteen-year-old Nathaniel Brazill shot and killed a teacher at his middle school, Barry Grunow. . . . As Grunow attempted to close the classroom door, Brazill pulled the trigger and Grunow fell to the floor, with a gunshot wound between the eyes. A school surveillance videotape of the hallway revealed that Brazill had pointed the gun at Grunow for nine seconds before shooting. Brazill exclaimed: "Oh s__t," and fled.

Core Concepts and Summary Statements

Introduction

Defendants are excused who are not considered legally responsible for their criminal acts.

The Insanity Defense

A. A defendant who is legally insane is committed to a mental institution.
B. The right-wrong test excuses individuals who, due to a mental disease or defect, are unable to distinguish between right and wrong.
C. The irresistible impulse test asks whether a mental disease or defect has resulted in a loss of control and an inability to avoid committing a criminal act.
D. The Durham product test excuses individuals whose criminal conduct results from a mental disease or defect.
E. The substantial capacity test broadens the right-wrong and irresistible impulse tests.
F. There is a continuing debate over the insanity defense. Some states have abolished the insanity defense and others have introduced a verdict of "guilty but mentally ill."

Diminished Capacity

An individual who is not legally insane may reduce the seriousness of a criminal charge in the event that a mental disease or defect prevents the formation of a criminal intent.

Intoxication

Voluntary intoxication is increasingly not recognized as an excuse. The common law considered this a defense to crimes requiring a specific intent. Involuntary intoxication constitutes an excuse when it results in a condition satisfying the test for legal insanity.

Age

Defendant's age may result in an incapacity to form a criminal intent.

Duress

A defendant may be excused if a crime is committed under the threat of the imminent infliction of serious physical harm or death.

Mistake of Law and Mistake of Fact

Mistake of law is ordinarily not an excuse; mistake of fact may result in a lack of criminal intent.

Entrapment

Entrapment excuses criminal conduct in those instances when the actions of the government cause an otherwise innocent individual to commit a crime.

New Defenses

Various new defenses have been proposed that are based on modern psychological and sociological evidence and cultural factors.

Introduction

An act that is ordinarily subject to a criminal penalty is considered to be *justified* and carries no criminal liability when it preserves an important value and benefits society. Self-defense, for instance, protects human life against wrongdoers. The defendant insists, "I broke the law, but I did nothing wrong. Society benefited from my act."

Excuses, in contrast, provide a defense based on the fact that although a defendant committed a criminal act, he or she is not considered responsible. The defendant claims that although "I broke the law and my act was wrong, I am not responsible. I am not morally blameworthy." This is illustrated by legal insanity that excuses criminal liability based on a mental disease or defect. Individuals are also excused due to youth or intoxication or in those instances when they lack a criminal intent as a result of a mental disease or defect. Defendants are further excused in those instances when they commit a criminal act in response to a threat of imminent harm or a mistake of fact or are manipulated and entrapped into criminal conduct.

Excuses are very different from one another and each requires separate study. The common denominator of excuses is that the defendants are not morally blameworthy and therefore are excused from criminal liability.

The Insanity Defense

For a deeper look at this topic, visit the study site.

English common law initially did not consider a mental disturbance or insanity as relevant to an individual's guilt. In the thirteenth century, it was recognized that a murderer of "unsound mind" was deserving of a royal pardon and, as the century drew to a close, "madness" was recognized as a complete defense.[1] This more humanistic approach reflected the regrettable "wild beast" theory that portrayed "madmen" as barely removed from "the brutes who are without reason."[2]

The **insanity defense** is one of the most thoroughly studied and hotly debated issues in criminal law. The debate is not easy to follow because the law's reliance on concepts drawn from mental health makes this a difficult area to understand. Texas residents must have scratched their heads in 2004 when Deanna Laney was acquitted by reason of insanity for crushing the skulls of her three sons with heavy stones. She then proceeded to call the police and informed them that "I just killed my boys." The youngest at the time was a fourteen-month-old who was left brain injured and nearly blind. Two years earlier, another Texas mother, Andrea Yates, received a life sentence for drowning her five children in the bathtub. Yates told the police that the devil had told her to kill her children, and despite Yates's history of mental problems and claim of insanity, the jury found that she was able to distinguish right from wrong. Yates's conviction was overturned on appeal and, in July 2006, a Texas jury ruled Yates not guilty by reason of insanity. Laney reportedly believed that she and Yates had been selected by God to be witnesses to the end of the world.

Defendants who rely on the insanity defense are typically required to provide notice to the prosecution. They are then subject to examination by a state-appointed mental health expert and they will usually hire one or more of their own "defense experts." These experts will interview the defendant and conduct various psychological tests. The prosecution and defense experts will then testify at trial and additional testimony is typically offered on behalf of the defendant by people who are able to attest to his or her mental disturbance. The nature of a defendant's criminal conduct is also important. The prosecutor may argue that a well-planned crime is inconsistent with a claim of insanity. The jury is then asked to either return a verdict of "guilty," "not guilty," or "not guilty by reason of insanity" (NGRI). In some jurisdictions, the jury considers the issue of insanity in a separate hearing in the event that the defendant is found guilty.

A defendant found NGRI in some states is subject to immediate committal to a mental institution until he or she is determined to be sane and no longer poses a threat to society. In most states, a separate **civil commitment** hearing is conducted to determine whether the defendant poses a danger and should be interned in a mental institution. Keep in mind that this period of institutionalization may last longer than a criminal sentence for the crime for which the defendant was convicted.

Why do we have an insanity defense? Experts cite three reasons:

- *Free Will.* The defendant did not make a deliberate decision to violate the law. His or her criminal act resulted from a disability.
- *Theories of Punishment.* A defendant who is unable to distinguish right from wrong or to control his or her conduct cannot be deterred by criminal punishment, and it would be cruel to seek retribution for acts that result from a disability.
- *Humanitarianism.* An individual found not guilty by reason of insanity may pose a continuing danger to society. He or she is best incapacitated and treated by doctors in a noncriminal rather than in a criminal environment.

In the United States, courts and legislators have struggled with balancing the protection of society against the humane treatment of individuals determined to be not guilty by reason of insanity. There have been several tests for insanity:

- M'Naghten (twenty-eight states and the federal government recognize all or a part of this test)
- Irresistible impulse (roughly seventeen states recognize this in conjunction with another test)
- Durham product test (New Hampshire)
- American Law Institute, Model Penal Code standard (roughly fourteen states)

The fundamental difference among these tests is whether the emphasis is placed on a defendant's ability to know right from wrong or whether the stress is placed on a defendant's ability to control his or her behavior. You might gain some appreciation of what is considered an inability to tell right from wrong by considering a young child who has not been taught right from wrong and takes an object from a store without realizing that this is improper. As an example of an inability to control behavior, think about a motorist who suddenly erupts in "road rage" and violently threatens you for driving too slowly.

Keep in mind that an individual who is "mentally challenged" may not necessarily meet the legal standard for insanity. A serial killer, for instance, may be mentally disturbed but still not considered to be so impaired by a mental illness or so retarded as to be considered legally insane. Juries generally find the determination of insanity to be highly complicated and they experience difficulty in following the often technical testimony of experts. As a result, jurors often follow their own judgment in determining whether a defendant should be determined to be not guilty by reason of insanity.

You also should be aware that insanity is distinct from **competence to stand trial**. Due process of law requires that defendants should not be subjected to a criminal trial unless they possess the ability to intelligently assist their attorney and to understand and follow the trial. The prosecution of an individual who is found incompetent is suspended until he or she is found competent.

The Right-Wrong Test

Daniel M'Naghten was an ordinary English citizen who was convinced that British Prime Minister Sir Robert Peel was conspiring to kill him. In 1843, M'Naghten retaliated by attempting to assassinate the British leader and, instead, mistakenly killed Sir Robert's private secretary. The jury acquitted M'Naghten after finding that he "had not the use of his understanding, so as to know he was doing a wrong or wicked act." This verdict sent shock waves of fright through the British royal family and political establishment, and the judges were summoned to defend the verdict before Parliament. The judges articulated a test that continues to be followed by roughly one-half of American states.[3]

- At the time of committing the act, the party accused must have been suffering from such a defect of reason, from a disease of the mind as a result of which:
  - the defendant "did not know what he was doing" (did not know the "nature and quality of his or her act"); or
  - the defendant "did not know he was doing wrong."

The "mental disease or defect" requirement is satisfied by any organic (physical) damage, psychological disorder, or intellectual deficiency (e.g., a low I.Q. or feeblemindedness) that results in an *individual's either not knowing "what he was doing" or not knowing he was "doing wrong."*

The most common mental disorder or defect that results in legal insanity under the **M'Naghten test** for insanity is a psychosis, a psychological disorder that results in an inability to distinguish between reality and fantasy. Another frequent mental disorder is a neurosis, which is simply a compulsive drive to engage in certain behavior. The mental conditions that are generally not considered to fall within the notion of a mental disease or defect are sociopathic or personality disorders that lead individuals to engage in patterns of antisocial or criminal conduct. These people are generally aware of the difference between right and wrong and believe that they are above the law and the rules that apply to other people.[4] A Georgia appellate court offered a fairly straightforward definition of mental disease or defect. The court stated that the "term mentally ill means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. The term mentally ill does not include a mental state shown only by repeated unlawful or antisocial conduct."[5]

The requirement that the defendant did not know the *"nature and quality of the act"* requirement is extremely difficult to satisfy. The common example is that an individual squeezing the victim's neck must be so detached from reality that he or she believes that he or she is squeezing a lemon. Individuals suffering this level of mental disturbance are extremely rare, and the M'Naghten test assumes that these individuals should be detained and receive treatment and that criminal incarceration serves no meaningful purpose and is inhumane.[6]

Courts differ on what it means for a defendant to *"know" that his or her act "was wrong."* Some judges interpret "know" to require an understanding that to kill is prohibited. Others demand a demonstration that the defendant fully comprehends that the reason killing is wrong is that it causes pain, hurt, and harm to the victim and to his or her family. Professor Arnold Loewy explains that "one may 'know' that it is wrong to kill in the sense that he can articulate these words, but lack the capacity to really feel or appreciate the wrongfulness of killing."[7]

There also is an ongoing debate over whether a defendant must know that an act is a "legal wrong" or whether the defendant must know that the act is a "moral wrong."

State v. Crenshaw attempted to resolve this conflict. The defendant Rodney Crenshaw was honeymooning with his wife in Canada and suspected that she was unfaithful. Crenshaw beat his wife senseless, stabbed her twenty-four times, and then decapitated the body with an axe. He then drove to a remote area and disposed of his wife's body and cleaned the hotel room. Crenshaw claimed to be a member of the Moscovite religious faith, a religion that required a man to kill a wife guilty of adultery. He claimed he believed that his act, although illegal, was morally justified. Was Crenshaw insane based on his belief that his act was morally justified? Did he possess the capacity to distinguish between right and wrong?

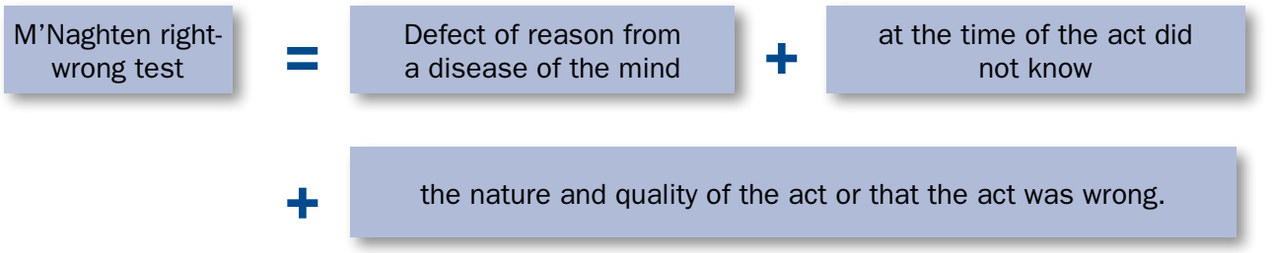
Crenshaw was convicted and appealed on the grounds that the judge improperly instructed the jury that insanity required a finding that as a result of a mental defect or disease, Crenshaw believed that his act was lawful rather than moral. The Washington Supreme Court, however, concluded that under either a legal or moral wrongfulness test, Crenshaw was legally sane. The court noted that Crenshaw's effort to conceal the crime indicated that he was aware that killing his wife was contrary to society's morals as well as the law. The Washington Supreme Court ruled that in the future, courts should not define "wrongfulness," and that jurors should be left free to apply either a societal morality or legal wrongfulness approach. Some states create an exception and consider an individual legally insane who believes that his or her action resulted from a direct command from God (a "deific decree").[8]

In *Clark v. Arizona,* the U.S. Supreme Court upheld the constitutionality of an Arizona statute that limited the insanity defense to individuals who did not know "what [they were] doing was wrong" (moral incapacity). The statute did not include within the definition of insanity the other part of the M'Naghten test that takes in individuals who do not know the "nature and quality of the act (cognitive or mental incapacity)." The Supreme Court held that Arizona's formulation satisfied the requirements of due process because evidence introduced to establish that Clark did not know the nature and quality of his act also would establish that he did not know that his act was wrong. The trial court heard evidence that Clark shot a police officer whom he believed was an alien from outer space. Clark appealed on the grounds that the trial court should have considered this evidence to determine whether Clark knew the nature and quality of his act. The Supreme

Court held that Clark was not denied fundamental justice because this very same evidence was considered by the court in deciding whether Clark knew that his act was wrong.[9]

It's likely you are fairly confused at this point. The right-wrong test is clearly much too difficult to be easily applied by even the most educated and sophisticated juror. In the end, juries tend to follow their commonsense notion of whether the defendant was legally sane or insane. *Lopez v. State* is a case that provides a good example of the characteristics of a defendant who is evaluated as legally insane under the M'Naghten test. Consider the factors relied on by the Texas Court of Appeals for the Thirteenth District in reaching this conclusion.

The Legal Equation



Was Lopez legally insane at the time of the killings?

Lopez v. State, *13–05–148-CR (Tex. App. 2007), Opinion by: Rodriguez, J.*

Issue

In July 1992, appellant, Carlos Lopez, was indicted for the capital murder of two individuals by stabbing each with a knife during the same criminal transaction. Approximately one year later, a jury returned a verdict that appellant was incompetent to stand trial. The jury also found that there was a substantial probability that appellant would attain competency to stand trial within the foreseeable future. In August 2004, a determination was made that appellant had regained competency to stand trial.

On November 30, 2004, trial began. Appellant raised the affirmative defense of insanity. On December 8, 2004, the jury returned a verdict of guilty, rejecting appellant's insanity defense. The trial court sentenced appellant to life imprisonment in the Institutional Division of the Texas Department of Criminal Justice. . . . [A]ppellant contends the jury's rejection of the insanity defense was against the great weight and preponderance of the evidence. The question is whether the defendant knew that his conduct was wrong or illegal.

Facts

On July 1, 1992, appellant entered Room 109 at Riverside Hospital, where two elderly patients, Mrs. Estefana Munoz and Mrs. Mary Kocurek, were rehabilitating from recent surgeries. Mrs. Munoz was a family friend, Mrs. Kocurek, her roommate. As Debra Muncell Flynn, an employee of the hospital, was leaving Room 109, she saw appellant stab Mrs. Munoz multiple times. Appellant also stabbed Mrs. Kocurek. He walked out of the room, down the hall, and into a restroom. When appellant came out of the restroom, a maintenance-security guard apprehended him. Lopez and Mrs. Munoz lived in the same neighborhood and members of their families had married one another. Appellant had dated Mrs. Munoz's granddaughter, Mary Lou Wyatt, from approximately 1975 to 1980.

The Texas Penal Code Annotated section 8.01 provides that "[i]t is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." The question is whether at the time of the conduct charged, the defendant, as a result of severe mental disease or defect, did not know the conduct was wrong or illegal. "The purpose of the insanity defense issue is to determine whether the accused should be held responsible for the crime, or whether his mental condition will excuse holding him responsible." In this case, there is no disagreement that the evidence established that appellant was suffering from a severe mental defect or disease at the time of the offense. Thus,

the first element of the insanity defense is satisfied. We will, therefore, review only the second element of the defense—whether appellant knew his conduct was wrong or illegal. Knowledge that conduct is "wrong" does not depend upon the defendant's own personal moral code, but is judged by whether the defendant understood that others believed his conduct was wrong or knew that his action was "illegal" by societal standards.

"Expert testimony on the issue of appellant's ability to determine right from wrong does not establish insanity as a matter of law." While expert testimony may aid the jury in its determination of the ultimate issue, it does not dictate the result. When circumstances suggest otherwise, a jury may accept or reject, in whole or in part, an expert's opinion that the defendant was insane and may even accept lay testimony over that of experts. Because circumstances of a crime are always important in determining the accused's mental state—whether he knew his conduct was wrong or illegal at the time of the offense—the jury may consider such evidence as: his demeanor before and after the offense; attempts to elude police; attempts to conceal incriminating evidence, expressions of regret, fear, or a knowledge of the serious consequences of his action; other possible motives for committing the offense; and other explanations for his behavior. Ultimately, determination of the insanity issue lies within the province of the jury, as to credibility of witnesses and weight of the evidence, as well as the limits of the defense.

Appellant's mother, Ascencion Martinez Lopez, testified that in the days and weeks prior to July 1, 1992, appellant had been very upset and very anxious and was acting very strange. He woke up and said that it wasn't his house, the shirt he put on was buttoned up wrong, and he put on one brown boot and one black boot. Appellant said that he was God, the Messiah. Appellant also told Mrs. Lopez that Mary Lou Wyatt and Mrs. Munoz had put a curse on him. Mrs. Lopez remembered appellant talking about witchcraft and saying that the world was full of witchcraft and that he needed to do something about the witches in the world. A few days before the stabbings, appellant and his mother had visited Mrs. Munoz at the hospital.

Nila Martinez Lopez, appellant's aunt, testified that two weeks before the killings, appellant told her that Wyatt, one of the victim's granddaughters, had put a curse on him. She testified that through the years, appellant appeared to be "fixated" on Wyatt. Harry Rucker, appellant's friend, testified that he noticed appellant was changing, that he was talking about voodoo and hexes. On the evening of his arrest, appellant called Rucker from the jail and said he did not kill those people, that "[v]oodoo did." A few months later, appellant called him again and told him about "the voodoo and stuff." Rucker did not feel like appellant was in his right mind; he testified he had seen appellant decline throughout, for a long time.

Rebecca Sue Boone, a bartender at the Frontier Saloon, testified that she saw appellant the evening before the incident. She walked into the bar, and everybody was complaining that appellant was acting weird. Boone went over to appellant, who said he was going to be the next President of the United States. . . . He was just not Carlos Lopez, period. . . . He was a total stranger." Appellant also mentioned that he was Ross Perot and God. In her opinion, appellant was having mental problems.

Barbara Huett was employed as a receptionist and appointment secretary at the dental office of Robert Cody, D.D.S., located next to the Riverside Hospital medical complex. She testified that a little before 10:00 A.M. on July 1, 1992, appellant came into the office without an appointment; he was not even Dr. Cody's patient. When she asked him to wait a moment, appellant said, "What's 64 minus?" He also said, "Someone's going to get hurt," and later said, "Someone is going to get fired." Huett described appellant's behavior as schizophrenic; abnormal. He was not engaging in conversation; he was just telling her something. He also asked what Huett's name was, and when she told him "B.J." he said, "Well, I'm Dr. C.J." After being told that he had no appointment, but that she would be glad to make one for him, he looked at her, smiled, turned around, and walked out the door. She agreed that appellant did not seem to be in his right mind; that he was laboring under a mental illness—he would talk to her one minute apparently very agitated and the next minute would appear to be very calm, smiling, and at ease.

On July 1, 1992, the day of the incident, Riverside Hospital was having problems with its air conditioning system. The rooms were hot, and the employees, including Flynn, were distributing fans to the rooms. Flynn entered Room 109 and saw appellant visiting with the two women patients. Appellant approached Flynn and asked why the air conditioning system was down. Flynn noticed that as appellant questioned her, he made a tight fist at his side and commented, "[Y]ou could die in this heat." Flynn explained that efforts were being made to correct the problem with the air conditioning system. Flynn talked to the patients and started to exit the room. As she walked by appellant, she noticed that he had a very "thoughtful look on his face," like he was thinking about something. Appellant seemed okay, like he was just there visiting. Flynn never perceived that he acted strange, assertive, or unusual. As Flynn stepped into the hallway, she turned around and saw appellant approach the women with a knife in his hand. The women had their hands up in the air. Flynn saw appellant start to stab something white between the women, possibly a pillow. Appellant stabbed Mrs. Munoz multiple times. Flynn left the room and sought help. She did not see appellant stab Mrs. Kocurek.

Eloisa Leza, a licensed, vocational nurse employed by Riverside Hospital, testified that she heard Flynn running down the hallway screaming. . . . Leza caught appellant's attention when she entered the room, and he said, "If you want to see witches, I will show you witches." His comment did not make any sense to her. She couldn't say that

she thought he was going crazy, but she stated that "[i]t was not a logical thing that he was saying, there were no witches in there." . . . From the room across the hall, Leza saw appellant come out of Room 109 after the screaming had stopped. With the knife in his hand, appellant walked away from the room; he walked very naturally and did not run and did not seem angry. The knife was in plain view. Appellant made no attempt to dispose of the knife.

Charlotte Nolan, a nurse at the hospital, testified that she heard screaming and went to Room 109 to find out what was wrong. . . . Nolan testified that after appellant had stabbed the women, she returned to the room and asked him to put the knife away. Appellant was coming across the hall and wailing his arms and saying, "I'm powerful. I am great. Look what I have done." After she again asked him to put the knife down and go away, all of a sudden he looked at her and responded, "Oh, yeah, sure," and then walked off down the hall. Appellant acted like he really did not know why she was asking him to put down his knife and go away.

Luis Alberto Vasquez, who worked in maintenance and security at Riverside Hospital in 1992 . . . talked to appellant. Appellant did not say any threatening words to Vasquez and did not wave the knife at him. Vasquez did not see appellant threaten anybody with the knife. Up until the time he was handcuffed, appellant only spoke in Spanish. Appellant kept saying, "las mate por que eran brujas," which translates to "he killed them because they were witches." Appellant repeated, in Spanish, "brujeria, I killed them because of brujeria." He seemed fixated on that issue. Vasquez also testified that appellant's conversation about witches seemed irrational. He never heard appellant utter the words, "I'm sorry," in either English or Spanish. . . . Approximately five minutes later, appellant exited the men's restroom. His hands were clean and the knife, with the blade closed, was in his hand. Appellant offered no resistance. Vasquez told appellant to get up against the wall, and when he attempted to cuff his hands behind his back, appellant said, in English, not to cuff him behind his back because he had back surgery. . . . Vasquez described appellant's demeanor as calm, not even angry. Before he entered the bathroom, they were talking about the witches. Vasquez testified that appellant "looked normal just saying that he killed them because they were witches." When he came out of the restroom, his demeanor was normal, calm. He made no attempt to flee. According to Vasquez, Raul Bernal, director of hospital maintenance/security at that time, watched from a distance and approached Vasquez and appellant after appellant was handcuffed. Both men escorted appellant out of the lobby area. At this time, appellant was fairly passive, not combative, not argumentative. Vasquez had no difficulty restraining him. Appellant let Vasquez cuff him and walked calmly with them when he was turned over to the police department without incident.

Tyrone W. Looper was the first police officer on the scene. . . . Officer Looper described appellant's demeanor as "real passive," "no problem," and "real quiet." Appellant told him, "I did it" and muttered something in English about witchcraft—about a grandmother or a curse—that someone had put a curse on him. Corpus Christi Police Officer Richard Carl Stacey . . . testified that he was with appellant for a matter of hours and described appellant as "calm, very matter-of-factly [sic], conversive, no problems whatsoever." There was nothing out of the ordinary or unusual about appellant's behavior during the time he had an opportunity to observe and speak with him. On cross-examination, Officer Stacey agreed, as a lay person, that mental illness or psychosis does not have to be apparent 100 percent of the time, and that it was possible that an hour earlier, he might have had a different view of what happened.

Sergeant R. L. Garcia, the case agent on this case, testified, through recorded testimony, that he was with appellant for at least three hours. Sergeant Garcia described appellant as alert, calm, and cooperative. He thought appellant was in his right mind at the time of the interview. However, during the interview appellant talked to an imaginary person. Sergeant Garcia said, "It was something at that point that was not real." When asked by the prosecution whether he believed that appellant was in his right mind, Sergeant Garcia responded, "Yes."

Fred Flores, custodian of records for the Nueces County Sheriff's Department, read from reports generated at the Nueces County Jail regarding appellant. . . . An inmate classification profile form, filled out on July 2, 1992, remarked the following:

"Current emotional status stable. Inmate is oriented. . . . During interview inmate displayed paranoia and delusional ideation specifically referring to incident where he had been hexed by witchcraft, poisoned by chemicals from a power plant and created by people who have . . . taken all his money. Inmate appears mentally unstable, should be considered potentially violent and aggressive. Did not express any suicidal self injuries, addictions."

According to another July 2, 1992 report, wrist restraints were put on appellant, and he was placed on ten-minute watch when he said, "I hear my calling. I must crucify myself and to the other inmates and myself." He was also suffering from hallucinations; he saw snakes coming out of the wall and the drain. Appellant also suffered from delusions about devil worshipers being after him. Flores heard appellant say that he was about to jump the fence, first off the bunk or from the sink, and he observed that appellant became very violent, and was unable to reason at all. Appellant later began crying, became violent again, and spoke of people dying and coming back. Appellant was restrained and a fifteen-minute watch instituted. On July 4, 1992, an incident report reflected that appellant again created a disturbance when he screamed, "[E]veryone is against me," and "I own this place. You're going to die. . . . You're going to hell with the rest of them." He remained uncooperative, was placed in wrist restraints, and was taken to a holding cell, where he could be closely monitored.

Wyatt testified that she believed that appellant wanted to hurt her grandmother, Mrs. Munoz, because of Wyatt's prior relationship with appellant that had ended 12 years earlier. Wyatt testified that, over the years, appellant wanted to get back together with her, but she told him she did not want to. She stated that appellant never got over the fact that she broke up with him and stated that the break-up was why he murdered her grandmother, to get back at her. She also testified, at trial, that she believed appellant wanted to hurt her grandmother because Wyatt prevented him from having a relationship with her son, who appellant believed was also his son. In Wyatt's statement, made the day after the incident, however, she stated, "I don't have any idea why he might have wanted to hurt my grandmother." In her opinion, appellant was not mentally ill, but was making everything up.

Joel Kutnick, M.D., a psychiatrist, testified that he was appointed by the court to evaluate appellant on the issue of insanity. Dr. Kutnick discussed his 1992 evaluation of appellant and appellant's psychiatric history. He told the jury that he reached the diagnosis of schizoaffective disorder (a combination of paranoid thinking and a sense of being all-powerful and extreme depression). He believed that appellant was delusional, didn't make sense, and spoke in gibberish. He also testified that he felt there had not been any falsehood (malingering) by appellant.

As to his conclusions regarding the issue of insanity and, more specifically, whether appellant knew his conduct was wrong or illegal, Dr. Kutnick testified that "Well, I felt that although, you know, this is a very serious event, that [appellant] believed that these two wom[e]n were witches in his mind. He wasn't doing—he was getting rid of witches, rather than just killing people out of meanness or revenge. And I think he was so ill, that it distorted his mind so that he didn't realize what he was doing was actually against the law or wrong." Dr. Kutnick testified that "[appellant] essentially killed both ladies because he thought they were witches. In fact, he loudly announced in the hospital 'if you want to see what witchcraft is,' and so in his mind he is ridding the world of evil." Dr. Kutnick further stated, "I don't say it lightly, I mean, this was a brutal murder. But, yes, I do believe that he was insane at the time and that he was so mentally ill, it distorted his mind that he saw that he was ridding the world of evil witches," and that appellant "started toying with the idea some time before that he had to get rid of the witches." Dr. Kutnick also testified that Lopez's thoughts were all mixed up with other things, such as the F.B.I., Rock Hudson, AIDS, plots, the sheriff, and the President. In his opinion, appellant was insane at the time of the offense.

Dr. Kutnick testified that the event was not planned out, or executed "with criminal intent." Although, it appeared to "have been a little planned in terms of when he said in the dentist's office somebody is going to get hurt," and he "started toying with the idea some time before that he had to get rid of the witches," most people planning to commit murder also plan to conceal it and not get caught. In this case, it was obvious, with appellant having committed the murders in front of people, that he was going to get caught. In other words, he didn't really make any real attempt to escape. He kind of sloughed down the hallway shouting, "if you want to see witchcraft." . . . So the whole setting didn't suggest somebody that was just, quote, a mean murderer. It suggested somebody that was ill. Dr. Kutnick concluded that "much as I know about him, I honestly believe he was ridding or trying to rid the world of evil witches."

Dr. Kutnick concluded by stating that in appellant's mind, because of the illness, he didn't know that what he was doing was wrong or illegal. According to Dr. Kutnick, appellant thought he was doing good. When someone is insane, "they have to be so ill that whatever action they're taking, their mind is distorted as they're doing something worthwhile or good. . . . [Appellant] fits the definition of being insane at the time of the murders."

Reasoning

In determining the issue of insanity, the jury may consider appellant's demeanor before and after the offense. In this case, the testimony revealed that appellant's demeanor before and after the offense included his concerns with witches and witchcraft, which had been apparent for many months, if not years, before the events occurred. Appellant talked with his mother about witchcraft and told her that the world was full of witchcraft and that he needed to do something about the witches in the world. Friends and relatives testified that two to three weeks before July 1, 1992, appellant talked of witchcraft and hexes and was expressing grandiose delusions, claiming to be God, the President of the United States, and Ross Perot. The morning of July 1, appellant's behavior was not normal. He appeared at two locations near the hospital—a dental office for an appointment he did not have, and at a bank to withdraw money from an account that had been closed long ago. Appellant also displayed delusional behavior the morning of the stabbings, claiming to be "Dr. C.J." and the owner of the bank.

When appellant arrived at the hospital on July 1, he attacked the victims while Flynn was in the doorway of the room. According to Flynn's testimony, appellant began by stabbing an object between the women, perhaps a pillow, suggesting irrational behavior. Leza's testimony that appellant was pacing and saying in an angry tone, "You want to see witches, I'll show you witches, come in here and I'll show you witches," supports a conclusion that appellant was operating under some delusion caused by his mental illness and that he did not know his conduct was wrong or illegal. Also, appellant had been to see Mrs. Munoz days earlier with his mother and knew her as a family friend. He did not know Mrs. Kocurek. Yet, appellant called both women witches after he killed them.

Flynn testified that appellant seemed in control after committing the offense, "sort of walking like, just leave me alone, get out of my way, kind of staggering, . . . talking to [people] . . . his attitude was just like, just leave me alone,

just get out of my way, just go away." Nolan testified that as appellant left Room 109, she asked him to put the knife down and he said: "I'm powerful. I am great. Look what I have done." After she asked him again to put the knife down and go away, he looked at her and responded, "Oh, yeah, sure," and then walked off down the hall. Nolan concluded that appellant acted like he did not know why she was asking him to put down his knife and go away.

Vasquez testified that appellant talked about witches after he committed the offense. Appellant looked normal as he said, "las mate por que eran brujas"—he killed them because they were witches—and "brujeria, I killed them because of brujeria." Although Bernal testified that appellant said he was sorry, Vasquez did not hear appellant utter those words, either in English or in Spanish. Appellant's demeanor was described as normal and calm by Vasquez, police officers, and Judge Tamez, all who saw him after the incident. Although the officers testified that appellant was quiet, passive, and posed no problem the evening after he was in custody, they also testified that appellant muttered about witchcraft and talked to an imaginary person. On the evening of his arrest, appellant called Rucker from the jail and said he did not kill those people, that "[v]oodoo did." Also, appellant's behavior and mental condition after his arrest, as documented by personnel at the Nueces County Jail, established that he suffered from hallucinations, delusions, and a deteriorating mental condition.

The jury may also consider evidence regarding any attempts by appellant to elude police and any attempts to conceal incriminating evidence. According to Flynn, appellant walked out of the room with the bloody knife in his hand. Appellant did not attempt to hide it, dispose of it, or hurt anyone else with it. He walked very naturally and did not run. Appellant did not say any threatening words to Vasquez and did not wave the knife at him. Appellant appeared to have washed his hands while in the restroom. Vasquez waited approximately five minutes for appellant to come out of the restroom. Appellant did not appear to be attempting to hide. Vasquez testified that appellant had folded the knife blade in his hand. There is no evidence of any attempt to conceal the knife. Appellant offered no resistance when Vasquez detained him, relinquishing the knife after Vasquez squeezed his hand. He appeared to be more concerned with Vasquez not hurting his back than with the consequences of his actions.

Finally, other possible motives for committing the offense may be considered in determining whether appellant knew his conduct was wrong or illegal. Dr. Kutnick thought appellant's motive for killing the women was that he believed they were witches and evil. The State provided Wyatt's testimony that appellant was trying to get back at her for the breakup of their relationship as a possible motive for his actions, completely aside from his asserted desire to get rid of witches.

Based on the circumstances of the crime, we conclude that appellant's demeanor before and after the crime supports the conclusion that his conduct was delusional such that he did not know it was wrong or illegal. Moreover, appellant made no attempt to conceal incriminating evidence or evade arrest. He expressed no regret or fear, and, except for one person testifying that he heard him say, "I'm sorry," there is no evidence of expressions of regret. Rather, in this case, appellant's concern at the time of his apprehension was that his back might be hurt. Also, there is no evidence that appellant had knowledge of the serious legal consequences resulting from the murders of these two elderly women. Finally, in order to accept Wyatt's theory that appellant was motivated by a desire to get back at her for the breakup of their relationship, we would have to also accept her position that appellant was not mentally ill, but was making everything up.

The evidence does not support the jury's rejection of appellant's affirmative defense of insanity. Rather, it supports the conclusion that appellant was mentally ill, was not malingering, and did not know his conduct was wrong or illegal. We conclude, therefore, that the State did not present evidence or rebut the evidence provided by the defense, either by lay testimony or by expert testimony, that could lead a reasonable jury to believe that appellant knew his acts were wrong or illegal.

The appellant believed that the two women were witches and that he was ridding the world of witches, rather than just killing people out of meanness or revenge. This distorted his mind so that appellant did not realize what he was doing was actually against the law or wrong. Appellant believed he was doing something good. He did not plan or attempt to conceal his actions so as to not get caught. There was no real attempt to avoid being caught. Dr. Kutnick testified that it was obvious, having committed the offense in front of witnesses, that appellant was going to get caught. Dr. Kutnick testified that, after reviewing police reports and witness statements, he got the impression appellant "wasn't acting like a criminal. In other words, he didn't really make any real attempt to escape. Appellant kind of sloughed down the hallway shouting, 'if you want to see witchcraft.'" Appellant thought he was doing a good thing; appellant's mental illness had so distorted his mind that he thought he was doing something right and good. In Dr. Kutnick's opinion, appellant was ridding or trying to rid the world of evil witches. In his mind, because of his illness, appellant didn't know that what he was doing was wrong or illegal. He thought he was doing good. Dr. Kutnick stated that when someone is insane, "they have to be so ill that whatever action they're taking, their mind is distorted as they're doing something worthwhile or good." . . . We conclude that, in this case, appellant's delusional state precluded him from knowing that his conduct was wrong or illegal.

Holding

It is undisputed that the testimony in this case establishes that appellant suffers from a schizoaffective disorder and/or schizophrenia—a serious mental disease. Considering all the evidence relevant to appellant's affirmative defense of insanity, we must now conclude that the judgment in

this case was overwhelmingly against the great weight and preponderance of the evidence on the question of whether, at the time of the conduct charged, appellant knew the conduct was wrong or illegal. . . . No rational jury could decide from the evidence presented that appellant was able to appreciate the wrongfulness of his conduct, that appellant understood the nature and quality of his actions, and that his conduct consisted of actions he ought not to do or that others believed his actions were wrong. We conclude that the jury's decision to reject the insanity defense was so against the great weight and preponderance of the evidence that it was manifestly unjust. While acknowledging that expert testimony does not dictate the result in this case, the rejection of the insanity evidence provided by both lay and expert witnesses appears arbitrary to this Court.

Questions for Discussion

1. What is the standard for legal insanity under Texas law?
2. Summarize the evidence supporting Lopez's claim of legal insanity.
3. List the facts that indicate that Lopez was able to "know that his conduct was wrong."
4. Why did Lopez decide that of all the people in the world Munoz was a witch who should be killed?
5. Do you agree with the decision of the appellate court? Should the court have reversed the verdict of a jury that was able to hear the evidence and evaluate the credibility of the witnesses?

See more cases on the study site: Demars v. State, *www.sagepub.com/lippmanccl2e*

The Irresistible Impulse Test

The M'Naghten test is criticized for focusing on the mind and failing to consider emotions. Critics point out that an individual may be capable of distinguishing between right and wrong and still may be driven by emotions to steal or to kill. Many of us are aware of the dangers of smoking, drinking, or eating too much and yet continue to indulge in this behavior. Various states responded to this criticism by broadening the M'Naghten standard and adopting the irresistible impulse test. This is often referred to as the "third branch of M'Naghten." The irresistible impulse theory was articulated as far back as 1887 when an Alabama court ruled that Nancy Parsons had been driven to assist in the killing of her husband by the delusion that he had cast an evil spell that caused her to suffer from a prolonged and life-threatening illness.

The **irresistible impulse test** requires the jury to find a defendant not guilty by reason of insanity in the event that the jurors find that the defendant possessed a mental disease that prevented him from curbing his or her criminal conduct. A defendant may be found legally insane under this test despite the fact that he or she is able to tell right from wrong. Individuals are not required to act in an explosive or impulsive manner under the irresistible impulse test and may calculate, plan, and perfect their crime. The central consideration is whether the disease overcame his or her capacity to resist the impulse to kill, rape, maim, or commit any other crime. Most courts also do not require that an individual lack total capacity to control his or her criminal impulses.[10] In 1887, in *Parsons v. State,* the Alabama Supreme Court articulated the irresistible impulse test:[11]

1. At the time of the crime was the defendant afflicted with a "disease of the mind"?
2. If so, did the defendant know right from wrong with respect to the act charged? If not, the law excuses the defendant.
3. If the defendant did have such knowledge, the law will still excuse the defendant if two conditions concur:
   A. if mental disease caused the defendant to so far lose the power to choose between right and wrong and to avoid doing the alleged act that the disease destroyed the defendant's free will, and
   B. if the mental disease was the sole cause of the act.

John Hinckley's acquittal by reason of insanity for the attempted assassination of Ronald Reagan sparked a reconsideration and rejection of the irresistible impulse test. After all, why should Hinckley be ruled legally insane because he attempted to kill President Reagan to fulfill an uncontrollable impulse to attract the attention of Jodie Foster, a young female film star?

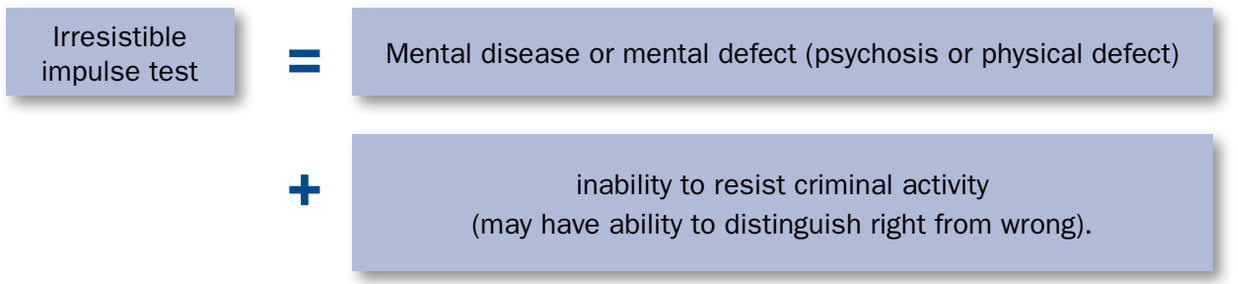
There was also a recognition that psychiatrists simply were unable to determine whether an individual experienced an irresistible impulse. The Fifth Circuit Court of Appeals concluded that the lack of knowledge concerning human impulses dictated that all criminal impulses should be considered "resistible." The court reasoned the irresistible impulse test had "cast the insanity defense adrift upon a sea of unfounded scientific speculation."[12]

Critics claimed that defendants were regularly making false claims of an irresistible impulse in an attempt to gain an acquittal. In *State v. Quinet,* the defendant conceded that he was able to distinguish right from wrong, but contended that he was unable to control himself and that he was driven to plan the rape and murder of twenty-seven of his former female classmates and an escape to Australia where he planned to commit suicide. The Connecticut Supreme Court rejected the defendant's claim and called attention to his demonstrated ability to plan and patiently wait to initiate the attacks, his reliance on videos to put himself in the proper mood to carry out the sexual assaults, and the emotional stability that enabled him to enjoy a dinner with friends several days prior to his unsuccessful effort to carry out the first attack.[13]

As a result, several jurisdictions abolished the irresistible impulse defense. The U.S. Congress adopted the so-called John Hinckley Amendment that eliminated the defense in federal trials and adopted a strict M'Naghten standard.[14]

- *Affirmative Defense.* It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. . . .
- *Burden of Proof.* The defendant has the burden of providing the defense of insanity by clear and convincing evidence.

The Legal Equation



The Durham Product Test

The **Durham product test** was intended to simplify the determination of legal insanity by eliminating much of the confusing terminology. The "product" test was first formulated by the New Hampshire Supreme Court in *State v. Pike* in 1869.[15] This standard was not accepted or even considered by any other jurisdiction until it was adopted in 1954 by the U.S. Court of Appeals for the District of Columbia.[16]

Durham provided that an accused is "not criminally responsible if his unlawful act was the product of mental disease or mental defect." This permitted expert witnesses to provide a broad range of information concerning a defendant's mental health and simplified the task of the jury, which now was only required to determine whether the defendant acted as a result of a mental disease or defect. Jurors no longer were placed in the position of making the difficult determination whether the defendant knew the difference between right and wrong or acted as a result of an irresistible impulse. The only requirement was to evaluate whether the accused was suffering from a disease or defective mental condition at the time he or she committed the criminal act and whether the criminal act was the product of such mental abnormality. However, the decision left the definition of a mental disease or defect undefined.

The District of Columbia Court of Appeals abandoned this experiment after eighteen years, in 1972, after realizing that the "product test" had resulted in expert witnesses playing an overly important role at trial.[17] In *Blocker v United States,* two experts from St. Elizabeth's Hospital concluded that Blocker suffered from a sociopathic personality disorder and testified that this did not amount to a mental disease or defect. Blocker was granted a new trial after pointing out that less than a month following the verdict in his case, another defendant was ruled legally insane as a result of a decision by the psychiatrists at St. Elizabeth's to change their position and to accept that a sociopathic personality disorder did indeed constitute a mental disease or defect.[18]

The Legal Equation

Durham product test = Unlawful act + product of disease or defect.

The Substantial Capacity Test

Psychiatric experts urged the American Law Institute (ALI) to incorporate the Durham product test into the Model Penal Code. The Institute, instead, adopted a modified version of the M'Naghten and irresistible impulse tests. Section 4.01(1)(2) provides that:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. . . . The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The important point is that the ALI **substantial capacity test** significantly broadens the test for legal insanity and increases the number of defendants who may be judged to be legally insane.

- *Appreciate*. The ALI test modifies M'Naghten by providing that a defendant may lack a substantial capacity to appreciate rather than know the criminality of his or her conduct. This is intended to highlight that a defendant may be declared legally insane and still know that an act is wrong because he or she still may not appreciate the full harm and impact of his or her criminal conduct. In other words, a defendant may know that sexual molestation is wrong without appreciating the harm a sexual attack causes to the victim.
- *Substantial Capacity.* The ALI test requires that a defendant lack a substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The ALI observes that a test calling for total impairment is not "workable" because it limits the application of legal insanity to individuals suffering from a delusional psychosis or to individuals who have absolutely no capacity to conform their conduct to the requirements of the law.
- *Conform Conduct to the Requirements of the Law.* The ALI standard does not use the word "impulse" in order to avoid the suggestion that individuals who are driven by emotions to break the law must act immediately and spontaneously and may not reflect and brood over and plan their criminal conduct.
- *Wrongfulness*. The ALI defines wrongfulness as an inability to appreciate that the community morally disapproves of an act and explains that in most cases, an individual will be unaware that such an act is also contrary to the criminal law. In order to be considered legally insane, a defendant who believes that his or her criminal conduct is justified must possess an inability to appreciate that the community would view his or her act as immoral.

In other words, the accused must believe that the community would endorse his or her murder of an individual who, in fact, is a messenger of "Satan the devil." The test also stresses that mental disease or defect does not include sociopaths or an abnormality that causes repeated criminal or antisocial conduct.

The ALI test was adopted by a majority of states and all but one of the federal circuit courts of appeals. The ALI's more tolerant and broader view of legal insanity was abandoned by all but a handful of states following John Hinckley's attempted assassination of President Ronald Reagan in 1981. The trend is to follow the lead of the U.S. Congress and to return to M'Naghten. These revised statutes typically integrate aspects of the substantial capacity test.

The next case, *State v. Thompson,* is an example of the type of factual analysis required of judges and jurors confronted with a defendant's plea of legal insanity. The case illustrates that although a defendant may suffer from a mental disease or defect, a jury might conclude that he or she possesses a "substantial capacity" to appreciate the wrongfulness of his or her acts. Do you agree with the decision of the Tennessee Supreme Court to affirm the jury verdict?

The Legal Equation

Substantial capacity test = Mental disease or defect + substantial incapacity + to appreciate criminality [wrongfulness] of an act or to conform conduct to requirements of the law.

May the jury disregard expert psychiatric testimony in deciding whether the defendant was legally insane?

State v. Thompson, *151 S.W.3D 434 (TENN. 2004), Opinion by: Barker, J.*

The defendant was convicted by a jury for the 1989 first-degree premeditated murder of his wife, the aggravated assault of his wife's niece, and the arson of his home. . . . The jury sentenced the defendant to death. After a hearing on the defendant's Motion for New Trial, the trial court found that the State had failed to prove the defendant's sanity beyond a reasonable doubt and modified the jury's verdict to "not guilty by reason of insanity." On appeal by the State, the Court of Criminal Appeals reversed, finding that . . . the evidence was sufficient to support the jury's verdicts of guilt. . . . The defendant filed an application for permission to appeal.

Issue

We granted the application to determine whether the evidence at trial was sufficient to support the jury's verdict, including its determination that the defendant was sane at the time of these offenses. After due consideration of the relevant authority, we conclude that the evidence was sufficient to support the jury's verdict of guilt. . . . Accordingly, the judgment of the Court of Criminal Appeals is affirmed.

Facts

In the days before the events in question, victim Nina Thompson confided to Vickie Lynn Estelle, her supervisor at the Jiffy convenience store in Athens, Tennessee, that she and her husband, the defendant, were having marital problems. The victim said that she was considering leaving him. On the evening of October 25, 1989, the victim asked Bryan Kevin Helms, a co-worker arriving to relieve her at the end of her shift, to cover for her if the defendant called or came looking for her. Helms agreed and did not ask any questions. The victim left with her niece, Dana Christine Rominger, and did not come home after work that night. Rominger testified at trial

that after the victim had spoken to her earlier that day about the problems she was having with the defendant and expressed fear for her own safety, Rominger told her she could spend the night with her. Rominger picked up the victim after work and the women went to Rominger's father's house where they spent the night.

The defendant spent the evening and early morning hours looking for the victim. During visits to the convenience store where the victim worked and to the victim's mother's home, the angry defendant stated that "he was ready to kill someone," that he was going "to kill that damn bitch Nina" and "kill the cops if they came to his trailer." He also threatened to "blow out" the brains of his eight-month-old son, Ricky, who was with him during his search for the victim. At one point, he purchased two gallons of kerosene or gasoline at the convenience store and showed Helms an assault rifle with a bayonet attached.

At 11:00 A.M. the following morning, the victim, Rominger, and the victim's five-year-old daughter drove to the couple's trailer and went inside. The defendant and Nina argued, and the defendant threatened to hurt the victim if she did not do what he said. The victim, her daughter, and Rominger then ran out of the trailer and got into Rominger's car, taking the eight-month-old Ricky with them. The defendant followed, carrying an assault rifle. The victim, still carrying baby Ricky, got out of the car at the defendant's direction. When Rominger began blowing the car horn and screaming for help, the defendant told her to "shut . . . up" and shot her in the leg. Rominger and the victim's daughter fled across the street to a neighbor's trailer. As the victim turned to run, the defendant shot her in the back. She fell to the ground on top of baby Ricky. As the baby crawled out from under his mother's body, the defendant stood over the victim and fired several more shots as she lay on the ground. He also fired several shots into the air and into cars parked nearby. The defendant then picked up baby Ricky, went into his trailer, and set it afire. When he left the trailer, he was overheard as he walked next to the victim's body stating, "See you later," as though nothing had happened. He then carried the baby to a store across the street, bought a soft drink, took some unidentified "powder," and waited for the police.

The defendant presented the expert testimony of two witnesses in support of his insanity defense. Dr. Tramontana, a clinical psychologist, opined that the defendant suffered from a mild to moderate impairment of the frontal lobe of his brain. On the day of the crime, this impairment would have affected the defendant's reasoning, his judgment, and his ability to inhibit impulsive reactions. . . .

Dr. Bernet, a psychiatrist, recounted the defendant's history of mental health problems, which included numerous hospitalizations from 1968 to 1984. Dr. Bernet testified that the defendant had an impairment to the frontal lobe of his brain as a result of chronic alcohol abuse. This impairment affected his ability to exercise self-control and curb impulsive behavior. Furthermore, the defendant suffered from a chronic psychiatric disorder called schizoaffective schizophrenia, which caused a loss of touch with reality, delusions, hallucinations, and drastic mood swings. These two conditions (the frontal lobe defect and the schizophrenia), could aggravate one another. Dr. Bernet testified that the defendant's mental defects could diminish his ability to appreciate right and wrong and conform his actions to the law. He admitted, however, that the defendant's condition would come and go and that he would have "good periods" during which he could function normally. . . .

The defense also presented the testimony of Nancy Smith, the defendant's first cousin, who testified that the defendant had been strange and out of touch with reality at times since he was a child. She also testified about the defendant's history of mental health problems, which included suicide attempts and repeated hospitalization over the years. On cross-examination, the defendant's cousin admitted that the defendant had not had any mental health problems requiring treatment from 1985 until the date of the shooting, although he continued to abuse drugs.

The State relied on the testimony of lay witnesses and cross-examination of the defendant's experts to rebut the claim of insanity. The defendant's physician, who had been treating the defendant for six months before the homicide, testified that on October 25, 1989, the day before the shooting, the defendant came to his office and appeared to be "stable." Family members, co-workers of the victim, neighbors, and others in contact with the defendant testified that although the defendant appeared somewhat withdrawn or different, they never saw anything bizarre or unusual about his behavior and that he was a good father. There was testimony that the defendant appeared agitated and angry the night before the killing, exhibiting an assault rifle and stating that he was mad enough to kill someone. He was also reported to have instructed his brother-in-law on how to feign mental illness. After the killing, the defendant gave the police a detailed account of the shooting and showed no emotion. He did not appear to be under the influence of drugs or alcohol.

At the conclusion of the proof, the jury returned a verdict of guilt of the first-degree (premeditated) murder of Nina Thompson, the aggravated assault of Rominger, and arson. Following a bifurcated sentencing hearing, the jury sentenced the defendant to death. Upon the defendant's motion for a new trial or judgment of acquittal, the trial court entered an order modifying the jury's verdicts to not guilty by reason of insanity. The court found that the State's evidence on sanity did not establish the defendant's sanity beyond a reasonable doubt as required by law. The court noted that the State's evidence consisted entirely of cross-examination of the defendant's expert witnesses and of some lay testimony concerning the defendant's behavior leading up to the event. The State presented no expert witnesses. Although several witnesses testified for the State that the defendant was acting "normal," many of these same witnesses also testified that the defendant was "odd," "nutty," "strange,"

or "different." Family members of the victim testified that when the defendant was looking for the victim at 4:00 A.M. the morning before the murder, that he had threatened anyone who tried to take his child and had said he would kill them all and be out of the Moccasin Bend [Mental Health Institute] in time to piss on their graves. There was a discrepancy about when the statement was actually made and the person who testified that he heard these comments never told anyone about them until the time for retrial, about 10 years after the offense. They also testified that the defendant threatened to harm the children. Even these family members indicated that the defendant was not acting in a rational manner.

The State appealed. . . . The Court of Criminal Appeals agreed that the defendant had raised a reasonable doubt as to his sanity, thus shifting the burden of proving sanity to the State. However . . . the court found the evidence legally sufficient to support the jury's verdict, including the finding of sanity beyond a reasonable doubt. . . .

Reasoning

At the time this offense was committed in October 1989, insanity was a defense to prosecution if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law. . . . Sanity was presumed. . . . If, however, the evidence raised a reasonable doubt as to the defendant's sanity, the presumption failed, and the State was required to establish beyond a reasonable doubt that the defendant both appreciated the wrongfulness of his conduct and was capable of conforming his conduct to the requirements of the law. . . . The jury could consider both lay and expert testimony on this issue and discount expert testimony which it found conflicted with the facts of this case. . . . The burden of proving sanity beyond a reasonable doubt could also be met by showing acts or statements of the petitioner, at or very near the time of the commission of the crime, that were consistent with sanity and inconsistent with insanity. . . .

The defendant presented compelling testimony from both Dr. Tramontana and Dr. Bernet that he suffered from an impairment of the frontal lobe of his brain. This impairment would have affected his ability to reason, his judgment, and his ability to inhibit impulsive reactions. He also suffered from a chronic psychiatric disorder, schizoaffective schizophrenia, which caused a loss of touch with reality, delusions, hallucinations, and drastic mood swings. Dr. Bernet opined that this disorder could have affected the defendant's ability to appreciate the difference between right and wrong and prevented his ability to conform his actions to the law. The defendant also presented lay testimony from his cousin concerning his history of mental health problems from childhood. Thus, it appears that the defendant successfully rebutted the presumption of sanity and shifted the burden to the State to prove sanity beyond a reasonable doubt.

On the other hand, the State effectively established, through cross-examination of these experts, that the defendant's illness was intermittent, and he had "good periods" when he was able to understand the concepts of right and wrong and conform his actions to the law. We find it significant that neither of the expert witnesses in this case testified unequivocally that the defendant was insane at the time of these offenses. There was also evidence that some of the psychological test results were invalid because the defendant had fabricated or exaggerated his symptoms. In addition, the State offered lay testimony which established that the defendant did not have mental health problems requiring treatment for the four years preceding the shooting. His treating physician, in fact, stated that on the day before the shooting, the defendant appeared to be "stable." Several witnesses testified that the defendant appeared agitated the night before the shooting and made threats to kill his son or to kill anyone who might try to take Ricky from him. Shortly after the shooting, the defendant showed no emotion as he recounted the details of the shooting during a police interview.

Holding

All in all, we find that the cross-examination of experts and lay testimony was sufficient to meet the State's burden of proving the defendant's sanity beyond a reasonable doubt. The jury was justified in finding that at the time of these crimes, the defendant was in a "good period" and was not affected by his disorder to the extent that he was unable to distinguish right from wrong or to conform his conduct to the requirements of the law. Accordingly, we agree with the Court of Criminal Appeals that the jury's verdict should be reinstated.

Questions for Discussion

1. What facts raise a reasonable doubt concerning Thompson's sanity? What facts did the prosecutor rely on to establish Thompson's sanity beyond a reasonable doubt?
2. How would you rule? Did the defendant, as a result of a mental disease or defect, lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law?

Burden of Proof

The defendant possesses the initial burden of going forward in every state. The defendant is presumed sane until some evidence is produced challenging this assumption. The defendant's burden varies and ranges from a "reasonable doubt" to "some evidence," "slight evidence," or a "scintilla of evidence." In roughly one-half of the states, the prosecution then possesses the burden of persuasion to establish sanity beyond a reasonable doubt. The defendant possesses the burden of persuasion in other jurisdictions by a preponderance of the evidence. In the federal system and in a small number of states, the defendant has the burden of establishing insanity by "clear and convincing evidence." A defendant must meet this burden in order for the issue of insanity to be presented to the jury.[19]

The Future of the Insanity Defense

Critics contend that the insanity defense undermines the functioning of the criminal justice system.

- *Bias*. Wealthy defendants are able to hire experts and are advantaged over the indigent. The insanity defense may also be exploited by perfectly sane defendants who have the resources to mount a credible insanity defense.
- *Theories of Punishment.* The insanity defense undermines the criminal justice system's concern with deterrence, retribution, and incapacitation by acquitting legally guilty defendants by reason of insanity.
- *Moral Blameworthiness*. The legally insane are not considered morally blameworthy and, as a consequence, are not incarcerated. On the other hand, there typically is a fine line between the legally sane and insane. Yet, the legally insane avoid imprisonment. The insanity defense also results in special treatment for individuals who are psychologically disadvantaged, while the law ignores disabilities such as economic deprivation.
- *Experts*. The insanity defense typically involves a battle of experts who rely on technical language that is difficult for jurors to understand. As a result, decisions on legal insanity may be based more on subjective impressions than on reasoned analysis.

Defenders of the insanity defense point out that critics exaggerate the significance of the insanity defense for the criminal justice system and that only a small number of deserving defendants are generally evaluated as legally insane. Statistics suggest that the defense results in an acquittal by reason of insanity in less than one percent of all criminal trials per year; this translates into an average of thirty-three defendants. These individuals may also spend more time institutionalized in a mental institution than they would have served had they been criminally convicted.[20]

Idaho, Montana, Kansas, and Utah have abolished the insanity defense and, instead, permit defendants to introduce evidence of a mental disease or defect that resulted in a lack of criminal intent. Idaho, for example, provides that a "[m]ental condition shall not be a defense to any charge of criminal conduct." Evidence of state of mind is admissible in Idaho to negate criminal intent, and a judge who finds that a defendant convicted of a crime suffers from a mental condition requiring treatment shall incarcerate the defendant in a facility where he or she will receive treatment.[21] State supreme courts have ruled that the insanity defense is not fundamental to the fairness of a trial and that the alternative of relying on evidence of a mental disease or defect to negate criminal intent is consistent with due process. Defendants under this alternative approach, however, continue to rely on experts and highly technical evidence.[22]

Thirteen states have adopted a verdict of **guilty but mentally ill (GBMI)**. Eleven of these states continue to retain the insanity defense, and in these states jurors may select from among four verdicts: guilty, not guilty, not guilty by reason of insanity (NGRI), and GBMI. A verdict of GBMI applies where the jury determines beyond a reasonable doubt that a defendant was mentally ill, but not legally insane, at the time of his or her criminal act. The defendant receives the standard criminal sentence of confinement and is provided with psychiatric care while interned. The intent is to provide jurors with an alternative to the insanity defense that provides greater protection to the public.

The GBMI verdict has thus far not decreased findings of legal insanity. Nevertheless, advocates of the insanity defense remain fearful that jurors will find the GBMI verdict more attractive than verdicts of not guilty by reason of insanity.[23]

In the last analysis, is it realistic to ask judges and juries to evaluate a defendant's mental stability? The Fifth Circuit Court of Appeals questioned whether we are serving the purpose of protecting society and deterring crime by introducing confusing medical concepts into criminal trials. At present, the law limits legal insanity to individuals who are unable to distinguish "right from wrong" while, in most states, refusing to recognize legal insanity in the case of individuals driven by an irresistible impulse. Is this a proper place to draw the line? Do we need an excuse of legal insanity?[24]

The next case, *Moler v. State,* raises the issue of whether jurors should follow the testimony of experts or should make their own independent judgments concerning a defendant's legal sanity or insanity. *Moler* is also an example of a verdict of GBMI.

Was the jury justified in disregarding the opinion of experts?

Moler v. State, *782 N.E.2D 454 (IND. CT. APP. 2003),* Opinion by: Baker, J.

Appellant-defendant Michael L. Moler appeals his conviction for murder, a felony, challenging sufficiency of the evidence. Specifically, Moler argues that his conviction may not stand because no witnesses testified that Moler was sane during the commission of his crime. . . .

Facts

The facts most favorable to the verdict are that Moler was living with Neil Wright and Neil's mother, Nina Wright. Both Neil and Nina knew that Moler had schizophrenia, but both also knew that Moler functioned normally while on medication. Six months prior to the murder, Nina's mother, Ethel Cummins, moved into Nina's residence. Moler helped care for the elderly Cummins, and Neil and Nina trusted him to care for her.

On the morning of January 6, 1998, Jean Sarver and her husband dropped Moler off at Lifespring Mental Health Services for an injection of anti-psychotic medication. During the drive, Moler appeared normal and spoke with the Sarvers as usual. The Sarvers then drove to their shop, not far from Lifespring. After Moler received his medication, he walked to the Sarver's shop, whereupon Mr. Sarver drove Moler home.

That afternoon, Moler picked Neil up from work and drove him home. Moler, Neil, and Cummins spent the afternoon watching television. During this time, Moler appeared fine and behaved normally. When Neil and Nina had to run an errand that evening, they left Cummins in Moler's care.

Upon returning, however, Neil and Nina found Cummins lying next to the couch with blood everywhere. When Moler, standing at the kitchen sink, shirtless, saw Neil, he said, "I didn't mean to do it. She's a witch. She turned into a witch." Neil hit Moler, who ran out of the house. Neil called for an ambulance, which soon arrived. Police officers also appeared on the scene. Cummins was transported to a hospital.

After the ambulance left, Officer Keith Hartman of the Jefferson County Sheriff's Department was speaking with Indiana State Trooper George True. Moler approached the officers. Officer Hartman noticed that Moler was shirtless, had stains on his jeans, and had scratches on his knuckles and hands. Moler told the two officers that he had "just killed that woman." Moler then told the officers that "she had turned into a witch and that he twisted her head around and killed her." Madison Police Captain Daniel Stephan, who knew Moler and was also at the scene, heard his name being called by Moler. Captain Stephan walked to where Moler, Officer Hartman, and Officer True were standing. Moler went on to tell Captain Stephan that he had killed a witch. At that point, Officer Hartman called a crime scene investigator.

Captain Stephan drove Moler to the Jefferson County Sheriff's Department. During the drive Moler appeared normal. Moler then began telling Captain Stephan how he attacked Cummins, though Captain Stephan repeatedly told Moler that Moler did not have to speak. After arriving at the Jefferson County Sheriff's Department, Moler was read his Miranda rights and signed a waiver form. Moler told Chief Deputy Sheriff Steve Henry that Cummins's hair "stood straight up." Moler then "went over and started to twist her head around." While he was doing this, "she turned into a witch, so he had to go ahead and kill her then."

The State initially charged Moler with attempted murder and aggravated battery. However, Cummins died six days after the attack. As a result, the State amended the information and charged him with murder. On March 18, 1998, Moler filed a notice of an insanity defense. . . . Moler was tried three times: the first verdict of guilty but mentally ill was vacated by the trial court as a result of juror misconduct; the second trial commenced but was terminated due to media coverage, and venue was transferred to Ripley County; the third trial, held in Ripley County, ended with a hung jury.

A fourth trial began on February 19, 2002. Prior to trial, the court had appointed two mental health professionals to evaluate Moler's mental state. At trial, Dr. Don A. Olive—who met with Moler several times—testified that "as a result of [the] mental disease [Moler] was unable to appreciate the wrongfulness of his conduct." Dr. Rodney Deaton testified, after interviewing Moler and reviewing Moler's medical records, that Moler was insane at the time of the killing.

Even though both experts testified that Moler could not grasp the unlawfulness of his acts, Moler's account to police regarding a "witch" remained consistent, and the forensic evidence showed that Cummins's head had indeed been "twisted." Moler was found guilty but mentally ill of both murder and aggravated battery. The trial court merged the aggravated battery conviction with the murder conviction. Moler was sentenced to the Department of Correction for fifty-five years, three of which were suspended. He now appeals.

Issue

Moler argues that his conviction may not stand because the State presented no evidence demonstrating that he was sane at the time of the crime. Specifically, Moler notes that while both expert witnesses testified that he was mentally ill at the time he killed Cummins, the State was unable to present witnesses to testify about his mental state at the time he committed the crime.

Reasoning

We first note that Moler never denied actually striking and killing Cummins. Rather, Moler's theory of defense was that he was insane at the time of the offense, there by vitiating his culpability. For his insanity defense to succeed, Moler had to prove by a preponderance of the evidence that "as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense."

The facts of this case are remarkably similar to those in *Barany v. State,* where our supreme court upheld a conviction notwithstanding unanimous expert opinion that the defendant was insane at the time he killed his live-in companion. In *Barany,* neighbors saw the defendant, naked, sitting on the end of a pier. Barany's live-in companion, Judith Tomlinson, placed a blanket on Barany, whereupon Barany bit Tomlinson's finger off. Tomlinson quickly ran back into her house. After a short while, Barany followed Tomlinson into the house and discovered that she was on the phone. He shot her eight times, used a splitting maul to destroy household appliances, and struck Tomlinson's body with the maul. At trial, three court-appointed psychiatrists testified that at the time of the murder, Barany was unable to understand the wrongfulness of his conduct. However, a police detective testified that a few hours after the crime, Barany told him that the victim nagged and complained. One of Barany's friends testified that Barany "seemed O.K." to him. Barany's sister testified that Barany had related to her that he believed Tomlinson was calling the police when he killed her. The jury found Barany guilty but mentally ill. On direct appeal, our supreme court upheld the conviction, finding that "the jury could have decided that [the lay] testimony about [Barany's] behavior was more indicative of his actual mental health at the time of the killing than medical examinations."

Here the medical experts unequivocally testified that Moler was insane at the time he killed the victim. However, lay witnesses testified about Moler's behavior before the crime occurred. Neil testified that Moler "seemed to be fine" during the afternoon of January 6, 1998. Nina testified that she saw nothing unusual in Moler's behavior the afternoon before the murder occurred. Jean Sarver testified that her conversation with Moler was normal during the morning drive to Lifespring. Sheri Goode, who gave Moler the injection at Lifespring, testified that "every time" a patient came for a shot, the patient was asked questions about suicidal or homicidal ideas. Goode also testified that nothing unusual was detected during Moler's January 6, 1998 visit.

Lay witnesses also testified about Moler's demeanor following the attack on Cummins. Captain Stephan, who had known Moler for twelve years, testified that Moler seemed "pretty normal" after the attack. Officer Hartman testified that Moler's general demeanor was "very calm, very relaxed" except for Moler's anxiety about not being allowed into the Wright residence to retrieve some cigarettes. Officer True observed that Moler's demeanor remained calm while Moler told him about how he killed Cummins.

Holding

While both medical experts concluded that Moler could not appreciate the wrongfulness of his conduct at the time of the crime, we are forced to follow the rule enunciated by our supreme court in *Barany.* Because lay witnesses testified to his normal demeanor before and after the crime, "the jury could have decided that [the lay] testimony about [Moler's] behavior was more indicative of his actual mental health at the time of the killing than medical examinations." Consequently, we are compelled to hold that sufficient evidence was presented to convict Moler of murder.

We note that . . . [it is] very difficult even for defendants with well-documented mental illnesses to successfully raise the insanity defense. . . . [E]ven if all expert testimony regarding a defendant's state of mind points to the fact that the defendant could not have appreciated the wrongfulness of his actions at the time of a crime, the jury is free to disregard the experts' opinions in favor of lay evidence of the defendant's demeanor before and after the crime.

While the jury is the ultimate finder of fact, we fail to see how evidence of a defendant's demeanor before and after a crime can have much probative value when a schizophrenic defendant is involved. Persons that suffer from schizophrenia can experience unpredictable delusions and hallucinations. . . . A delusion is "a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary." . . . A hallucination involves "a sensory perception that has the compelling sense of reality of a true perception but that occurs without external stimulation of the relevant sensory organ." . . .

During Moler's attack on Cummins, he "saw" her turn into a witch, according to several lay witnesses who related what Moler told them. Witnesses also testified that Moler told them he had "heard" someone tell him to "kill her and to send her home." Both court-appointed psychiatrists testified that Moler could not appreciate the wrongfulness of his conduct at the time of the attack. Although Neil and Nina testified to his apparent normality before the murders, the stark fact remains that his schizophrenia required periodic injected anti-psychotic medication, and he had just received such an injection the morning of the day the murder took place. Under these facts and circumstances, it is difficult to escape the conclusion that Moler suffered an unexpected and unpredictable hallucination and delusion at the time he attacked Cummins. It seems that Moler had a "firmly sustained" belief that Cummins was a witch from which he needed to protect himself. . . . It also appears that what he saw before he attacked Cummins had a sufficient "compelling sense of reality" to cause him to use physical force against Cummins. Indeed, even after the attack, Moler did not recant his statement that Cummins had turned into a witch.

The proposition that a jury may infer that a person's actions before and after a crime are "indicative of his actual mental health at the time of the" crime is logical when dealing with a defendant who is not prone to delusional or hallucinogenic episodes. However, when a defendant has a serious and well-documented mental disorder, such as schizophrenia, one that causes him to see, hear, and believe realities that do not exist, such logic collapses. In the interests of justice, we hope that our supreme court will revisit this rule.

Judgment affirmed.

Questions for Discussion

1. What is the legal test for insanity relied on by the Indiana Court of Appeals? What evidence supports Moler's legal insanity? Is there evidence that supports Moler's legal sanity?
2. The Indiana appellate court upholds the finding that Moler is "guilty but mentally ill." Why did the jury return a verdict of "guilty but mentally ill"? Do you think that it is better for Moler to be incarcerated in prison rather than committed to a mental institution?
3. Why is the appellate court critical of the rule of evidence that a jury may examine a person's actions before and after a crime as evidence of "actual mental health"?
4. As a juror, would you pay more attention to the psychiatrists or to the lay witnesses in determining whether Moler is legally insane?

See more cases on the study site: Kirkland v. State, *www.sagepub.com/lippmanccl2e*

You Decide

9.1 In January 1992, defendant Freddie Armstrong went to Loche's Mortuary to obtain a copy of his father's death certificate. The police responded to a call from the mortuary and found Armstrong with a bloody butcher's knife standing over the body of Reverend Fred Neal. One officer drew his gun and the defendant severed Reverend Neal's head from the corpse and held it up by the ears. Armstrong then placed the headless body in a chair and walked up the stairs and deposited the head in the toilet. Armstrong placed the knife in his briefcase, put on his cap, and walked out the door as if in a trance. Armstrong displayed no concern or awareness of the police. The medical evidence indicated that Armstrong had been evaluated as an acute paranoid schizophrenic and had been medically discharged from military service during the Vietnam War. He had been admitted to mental institutions in 1969, 1970, 1973, 1980, 1983, 1987, and 1992 and had been released three days prior to killing Reverend Neal. Armstrong apparently had been commanded by a hallucinatory voice to stab Reverend Neal while another voice told him that his actions were wrong. The legal standard for insanity in Louisiana is the ability to "distinguish between right and wrong." The jury determined that Armstrong was legally sane, a decision that was upheld by a Louisiana appellate court.

Armstrong's diagnosis indicated that he was not curable, but that his mental condition might be controlled through constant medication. Armstrong had delusions about his wife working against him, he heard voices of good and evil about Christ and the Antichrist, and he was not sleeping.

Armstrong called his brother on the day of the killing and announced that he had been nominated for President of the United States. He then missed an appointment for a drug injection to control his schizophrenia and drove to the mortuary and waited for Reverend Neal to enter the building. Armstrong was told by a voice that Reverend Neal was the Antichrist and testified that he severed the Reverend's head from the body in

order to prove that Neal would not bleed. The prosecutor found it significant that Armstrong' s violent impulse was limited to Reverend Neal, whom he was told by a "voice" was the Antichrist. and should be killed and sent to hell. At the jail following his arrest, Armstrong refused to take his medication, and stopped up the urinal, flooding his cell. He walked around naked carrying a Bible and stated that the federal government had been attempting to kill him for several years. The initial psychiatric evaluation indicated that he was aggressive, threatened to kill the staff, and believed that he was being poisoned.

The doctor who had been treating Armstrong for ten years stated that Armstrong became grossly psychotic when he was off his medication and had observed Armstrong in a psychotic state on two previous occasions. Armstrong typically was preoccupied during these periods with religion and the Antichrist. The doctor testified that when Armstrong was on his medication, he was capable of distinguishing right from wrong, but that he was unable to make this distinction when he was in a psychotic state. Another doctor examined Armstrong a month after the killing and stated that the defendant was unstable, delusional, and obsessed with destroying the Antichrist. The second doctor testified that Armstrong had heard a divine voice instructing him not to kill Reverend Neal, but that God had forgiven him. Three other psychiatrists testified, two of whom shared the view that Armstrong was legally insane. Another testified that she believed that Armstrong was able to distinguish between divine and human law and that he was aware that killing Reverend Neal was wrong. Was Armstrong capable of distinguishing "right from wrong"? Would you return a verdict of not guilty by reason of insanity? Would he satisfy the irresistible impulse test? See *State v. Armstrong,* 671 So. 2d 307 (La. 1996).

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Diminished Capacity

Diminished capacity is recognized in roughly fifteen states. This permits the admission of psychiatric testimony to establish that a defendant suffers from a mental disturbance that *diminishes* the defendant's capacity to form the required criminal intent. Diminished capacity merely recognizes that an individual has the right to demonstrate that he or she is incapable of forming the intent required for the offense. This is a compromise between finding an individual either not guilty by reason of insanity or fully liable. Some states confine diminished capacity to intentional murder and provide that an accused may still be convicted of second-degree murder, which does not require premeditation.

This often is referred to as the *Wells-Gorshen* rule based on two California Supreme Court decisions.[25] Gorshen, a dock worker, reacted violently when ordered to "get to work" and then precipitated a fight when he was told that he was drunk and should go home. The defendant later returned to work and shot and killed his foreman, Joseph O'Leary. The California Supreme Court affirmed the trial court's decision to convict Gorshen of second rather than first-degree murder, which requires a premeditated intent to kill. Psychiatric testimony indicated that the defendant suffered from chronic paranoiac schizophrenia, a "disintegration of mind and personality . . . [involving] trances during which he hears voices and experiences visions, particularly of devils in disguise committing abnormal sexual acts, sometimes upon the defendant." According to a psychiatrist, Gorshen believed that O'Leary's remarks demeaned his manliness and sexuality and that this sparked enormous rage and anger. The defendant was reportedly out of control and felt that he was slipping into permanent insanity. He blamed O'Leary and developed an obsession with killing him. The appellate court ruled that Gorshen possessed a driving and overwhelming obsession with murdering O'Leary and that he did not make a reasoned and conscious decision to kill.[26]

The diminished capacity defense has been rejected by some state courts that point out that psychiatric testimony is unreliable and too confusing for jurors and that the "medical model" is contrary to the notion that individuals are responsible for their actions.[27] The far-reaching implications of the diminished capacity defense became apparent when a San Francisco jury convicted city official Dan White of manslaughter for the killings of his colleague Harvey Milk and Mayor George Moscone. The defense argued that White's depressions were exaggerated by junk food, diminishing his capacity to form a specific intent to kill. In reaction to this "Twinkie defense," California voters adopted a statute that provides that the "defense of diminished capacity is hereby abolished" and shall not be admissible "to show or negate capacity to form the . . . intent . . . required for the commission of the crime charged."[28] The Model Penal Code, however, provides that evidence that a defendant suffers from a mental disease or defect is admissible "whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense." In other words, under this approach a defendant may introduce psychiatric evidence to negate the required intent in a prosecution for any criminal offense.[29]

Crime in the News

On July 22, 1991, two Milwaukee police officers looked out from their police cruiser and spotted an African American man with a handcuff dangling from his wrist. Troy Edwards excitedly explained that he had escaped from the apartment of a "weird dude" who had threatened him with a knife and then had attempted to handcuff him. The officers accompanied Edwards back to the apartment where they were greeted by Jeffrey Dahmer, described by the officers as an attractive thirty-one-year-old blond man. Dahmer appeared to be controlled and relaxed and offered to get the key to release the handcuffs. An officer entered the bedroom with Dahmer and found himself confronted with photographs of dismembered human bodies. Dahmer struggled with the officer who handcuffed him and placed him under arrest. The other officer opened the refrigerator door and was shocked to discover a head. The smell of the decomposition of human flesh in the apartment was potent and powerful. The officers opened a closet and found a metal stockpot that contained decomposed hands and a male sexual organ. Two skulls were on the shelf along with a glass jar containing male genitalia. There were photographs of a male head lying in a sink and of an individual cut open from the neck to the groin. Other pictures portrayed Dahmer's victims in various bondage and erotic poses.

Dahmer's arrest ended a killing spree that had begun in 1978 when Dahmer graduated from high school. His first victim was a hitchhiker whom he killed with a blow from a barbell following a sexual encounter. He then cut up the body and buried it in the backyard. In September 1987, Dahmer claimed his second victim when he killed another man following a sexual encounter. Dahmer then stuffed the body inside a suitcase, took the corpse to his grandmother's basement, masturbated, dismembered the body, and threw it in the garbage. Several months later Dahmer seduced and killed his third victim, a fourteen-year-old Native American. Dahmer continued to refine his gruesome seductive technique. He typically would offer his victims money for posing for photos or invite them to his apartment to drink beer and to watch videos. He then would drug and strangle them, have a sexual encounter with the corpse, and dismember and dispose of the bodies. He experimented with various chemicals until he developed the ability to reduce human flesh to a smelly sludge that he could dispose of down the drain or toilet.

Dahmer preserved the skulls and body parts and used them as sexual stimulants. In some instances, he would boil the head, remove the skin, and paint it gray so as to make it appear to be a plastic model. Dahmer ate the flesh of his victims, explaining that he believed that this would bring them back to life. He went so far as to experiment with various seasonings and meat tenderizers to enhance the taste of his victims. Dahmer reportedly found the flesh sexually stimulating and his freezer contained strips of human flesh. At one point, Dahmer experimented with drinking blood. He also engaged in Satanism and contemplated erecting a shrine in his apartment that would display all of his victims. Dahmer apparently believed that the shrine would provide him with "special powers and energies to help him socially and financially."

This was not Dahmer's first encounter with the law. In 1981, he had been arrested for drunk and disorderly conduct, which was followed in September 1988 by an arrest for molesting a thirteen-year-old Laotian boy. In 1989, Dahmer was arrested and pled guilty to the sexual exploitation of a child and second-degree sexual assault. He pled guilty, expressed deep regret and a desire to rehabilitate himself, and was sentenced to one year in jail. During the next fifteen months, Dahmer killed twelve individuals. The killing reached a crescendo in May and July 1991 when he killed at a rate of one individual a month.

Ten of Dahmer's victims were African American. The majority of the victims had arrest records for arson, sexual assault, rape, and battery and lived a dangerous or promiscuous lifestyle. These were individuals who could disappear without drawing a great deal of attention. Several potential victims are known to have escaped and presumably never approached the police.

Dahmer desired to control and to dominate and feared abandonment. Killing his victims meant that they would never leave the apartment. He experimented with controlling his victims by drilling holes in their skills and injected acid into their brain in an effort to create a helpless sexual partner who would always be available to provide pleasure.

There are no obvious developments in Dahmer's life that satisfactoriy account for Dahmer's adult obsession with death and sexuality. He was a lonely and isolated child of divorced parents who barely communicated with the outside world. At an early point in Dahmer's life, he developed an obsession with death and with collecting the body parts of dead animals. His inner pain undoubtedly led to his alcoholism, which, in turn, contributed to his flunking out of Ohio State and being released from the army. Criminologists have noted that Dahmer is distinguished from other serial killers by the fact that he not only desired to dominate and control his victims but also wanted to possess them after death.

The Dahmer trial was held in a heavily secured courtroom in which he was isolated by a bulletproof glass and steel barrier. He instructed his lawyer to plead guilty by reason of insanity. Defense attorney Gerald Boyle presented forty-five witnesses in an effort to persuade the jury that only a legally insane individual could engage in this type of serial murder. Boyle posed the question to the jury whether Dahmer was "evil" or whether Dahmer was "sick." He answered his own question by concluding that Dahmer was a "runaway train on a track of madness." Prosecutor Mike McCann responded by portraying Dahmer as a skilled manipulator who methodically planned his attacks. He clearly could control his urges because there was no evidence that he had molested students while enrolled at Ohio State or while in the army.

McCann concluded that Dahmer "wasn't a runaway train, he was an engineer." The prosecutor stressed to the jury that Dahmer "fooled a lot of people. Please don't let this murderous killer fool you." The psychiatrists were unable to agree on a diagnosis and differed over whether Dahmer was aware of the difference between right and wrong and whether he could control his actions.

The jury deliberated for five hours and convicted Dahmer of fifteen counts, concluding that he was guilty and sane. At sentencing, Dahmer stated that he now realized that he was "sick" and regretted the harm that he had caused. Dahmer was sentenced to fifteen consecutive life terms in prison without the possibility of parole. He proved to be a model prisoner and was gradually integrated into prison life at the Columbia Correctional Institute in Portage, Wisconsin. On November 28, 1994, Dahmer was assigned to a work detail with two other inmates. Twenty minutes later, the guards found Dahmer dead with a crushed skull. He had been killed by Christopher Scarver, an African American delusional schizophrenic who viewed himself as the son of God.

The Dahmer case continues to be at the center of the debate over the insanity defense. Commentators suggested that the jury verdict in the Dahmer case indicated that juries would no longer be willing to find defendants legally insane. They pointed out that if a jury could find Dahmer legally sane, no defendant ever likely would be found legally insane. On the other hand, did Dahmer satisfy the requirements of the M'Naghten test? Should the insanity defense be given a broader interpretation to include individuals like Dahmer? In the alternative, should the insanity defense be abolished?

Intoxication

Alcoholic beverages and drugs are commonly used to relax and to enhance enjoyment. These substances, however, can impede coordination and alertness, distort judgment, and cause impulsive and emotional reactions. It is not surprising that some studies suggest that more than half of those arrested for felonies have been drinking or using drugs. Should the law limit the legal responsibility of individuals who are drunk or are "high" on drugs or treat them more harshly? The law has struggled to find a balance between "conflicting feelings" of concern and condemnation for the "intoxicated offender."[30]

Voluntary Intoxication

Voluntary intoxication was not recognized as a defense under the early common law in England. Lord Hale proclaimed that the intoxicated individual "shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." William Blackstone went beyond this neutral stance and urged that intoxication should be viewed "as an aggravation of the offense, rather than as an excuse for any criminal behavior."[31]

The common law rule was incorporated into American law. An 1847 textbook recorded that this was a "long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found."[32]

The rule that intoxication was not a defense began to be transformed in the nineteenth century. Judges attempted to balance their disapproval toward alcoholism against the fact that inebriated individuals often lacked the mental capacity to formulate a criminal intent. Courts created a distinction between offenses involving a specific intent for which voluntary intoxication was an excuse and offenses involving a general intent for which voluntary intoxication was not recognized as an excuse. An individual charged with a crime requiring a specific intent was able to introduce evidence that the use of alcohol prevented him or her from forming a specific intent to assault an individual with the intent to kill. A defendant who proved successful would be held liable for the lesser offense of simple assault. As noted by the California Supreme Court, the difference between an intent to commit a battery and an intent to commit a battery for the purpose of raping or killing "may be slight, but it is sufficient to justify drawing a line between them and considering evidence of intoxication in the one case and disregarding it in the other."[33]

The Model Penal Code section 2.08(1)(2) accepts the common law's distinction between offenses based on intent and substitutes "knowledge" or "purpose" for a specific intent and "negligence or recklessness" for a general intent. The commentary to the code notes that it would be unfair to punish an individual who, due to inebriation, lacks "knowledge or purpose," even when this results from voluntary intoxication.[34]

Professor Jerome Hall observes that *in practice,* the hostility toward the inebriated defendant has resulted in the voluntary intoxication defense only being recognized in isolated instances, typically involving intentional killing.[35] Courts have placed a heavy burden on defendants seeking to negate a specific intent. Even the consumption of large amounts of alcohol is not sufficient. The New Jersey Supreme Court observed that there must be a showing of such a "great prostration of the faculties that the requisite mental state was totally lacking. . . . [A]n accused must show that he was so intoxicated that he did not have the intent to commit an offense. Such a state of affairs will likely exist in very few cases." This typically requires an evaluation of the quantity and period of time that an intoxicant was consumed, blood alcohol content, and the individual's conduct and ability to recall events.[36]

The contemporary trend is to return to the original common law rule and refuse to recognize a defense based on voluntary alcoholism. The Arizona Criminal Code, section 13–503 of the Arizona Revised Statutes Annotated, provides that "[t]emporary intoxication resulting from the voluntary ingestion . . . of alcohol . . . or other psychoactive substances or the abuse of prescribed medications . . . is not a defense for any criminal act or requisite state of mind." The Texas Penal Code Annotated section 8.04 provides that "[v]oluntary intoxication does not constitute a defense to the commission of crime." The right of states to deny defendants the intoxication defense was affirmed by the U.S. Supreme Court in 1996, in *Montana v. Egelhoff;* Justice Antonin Scalia noted that Montana was merely returning to the law at the time of the drafting of the U.S. Constitution, and that this rule served to deter excessive drinking.[37] Consider the Florida statute reprinted below.

The Statutory Standard

Florida Statutes Section 775.051. Voluntary Intoxication; Not a Defense; Evidence Not Admissible for Certain Purposes

> Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance . . . is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance . . . was pursuant to a lawful prescription issued to the defendant by a practitioner

Involuntary Intoxication

Involuntary intoxication is a defense to any and all criminal offenses in those instances that the defendant's state of mind satisfies the standard for the insanity defense in the state. The Model Penal Code section 2.08(4) requires that the individual "lacks substantial capacity" to distinguish right from wrong or to conform his or her behavior to the law. The code also recognizes "pathological intoxication." This arises in those instances when an individual voluntarily consumes a substance and experiences an extreme and unanticipated reaction. Involuntary intoxication can occur in any of four ways:[38]

- *Duress.* An individual is coerced into consuming an intoxicant.
- *Mistake.* An individual mistakenly consumes a narcotic rather than his or her prescribed medicine.
- *Fraud.* An individual consumes a narcotic as a result of a fraudulent misrepresentation of the nature of the substance.
- *Medication.* An individual has an extreme and unanticipated reaction to medication prescribed by a doctor.

The proliferation of drugs, medicine, and newly developed therapies promises to lead to involuntary intoxication being increasingly raised as a defense in criminal prosecutions. Consider the next case in the textbook, *Brancaccio v. State.*

Did the defendant's medication cause him to kill?

Brancaccio v. State, *698 So. 2d 597 (Fla. Dist. Ct. App. 1997), Opinion by: Klein, J.*

Appellant was found guilty of first-degree murder and kidnapping and sentenced to life in prison. He had admitted the killing, and the only issue for the jury to determine was whether he had the mental capacity to form the intent necessary to commit the crimes. We must reverse for a new trial because the court erred in refusing to instruct the jury . . . that he was involuntarily intoxicated as a result of the medication he was taking pursuant to a prescription.

Facts

Appellant, who was 16, gave a statement to the police explaining that he had had a fight with his mother over what they were having for dinner and went for a walk to cool down. He encountered a stranger who asked him to stop cursing and called him low class. He punched her repeatedly, led her to a vacant lot, and continued to punch her and kick her. When a car came along he became frightened and ran home.

He returned to the scene the next morning to ask the woman if she needed help, but she did not respond. The medical examiner testified that the woman had suffered at least four severe and potentially fatal blows to her head, as well as massive trauma to her chest, and that she would not have been alive at that point. Appellant then went shopping for car parts, but returned later in the day with newspaper and unsuccessfully attempted to set her body on fire. He then left and returned with spray paint, painting her body red in order to cover up his fingerprints.

Appellant's defense was that the medication he was taking, which was prescribed to him during his recent confinement in a mental hospital, had caused him to lose control. Two months prior to the killing, appellant had been committed to a mental health center . . . after threatening to kill his parents and himself. His parents then moved him to the Savannas Mental Hospital for treatment, where appellant was placed on Zoloft, a drug used to treat depression. The hospital also diagnosed appellant as suffering from alcohol abuse, attention deficit disorder, and oppositional defiant disorder. The hospital noted a change in appellant's personality after he was placed on Zoloft, in that appellant became more irritable, loud, had increased energy and was given to angry outbursts. Appellant had apparently attempted suicide while at the hospital by holding his breath.

[The condition of Oppositional Defiant Disorder is defined in the Diagnostic and Statistical Manual of Mental Disorders. . . . The essential feature of this disorder is a pattern of negativistic, hostile, and defiant behavior. . . . Children with this disorder commonly are argumentative with adults, frequently lose their temper, swear, and are often angry, resentful, and easily annoyed by others. They frequently actively defy adult requests or rules and deliberately annoy other people. They tend to blame others for their own mistakes or difficulties.]

A psychiatrist testifying for the defense, Dr. Wade Myers, testified that Zoloft may have had a reaction that was opposite to what it was supposed to have had in appellant, causing hypomania [which manifested itself by causing the appellant to have trouble concentrating, difficulty sitting still, an increased energy level, irritability, and anxiety]. The medical warnings for the drug state that the following side effects are infrequent but possible: "aggressive reactions, amnesia, anxiety, delusions, depersonalization, depression, aggravated depression, emotional instability . . . hallucinations, neurosis, paranoid reaction, suicidation and suicide attempts." "Infrequent" is medically defined as occurring between . . . 1 in 1,000 patients.

Dr. Myers examined appellant after his arrest and concluded that he suffered from major depression, possible bipolar disorder, alcohol abuse, a learning disability, and a probable brain injury. Appellant had been born prematurely and spent seven days in intensive care for oxygen deprivation. Also, at the age of two, he had nearly drowned and had to be resuscitated. His IQ is just above retarded.

Dr. Myers concluded that appellant did not have the ability to form the intent to commit first-degree murder based on his mental deficiencies and his involuntary intoxication by the Zoloft.

Another expert who testified for the defense, Dr. Peter R. Breggin, testified that in his opinion, Zoloft could have . . . "pushed him over." . . . Dr. Breggin was able to obtain information reported by doctors and pharmacists regarding reactions to the drug. Dr. Breggin found 22 reports tying the drug to hostile reactions, 57 reports linking the drug to an aggravation reaction, 55 suicide attempts, and 64 reports linking the drug to increased agitation. These reports suggest that the drug can cause a loss of impulse control. He opined that the hospital records from the mental hospital where appellant was confined indicate that he was experiencing a similar reaction to the drug. Dr. Breggin diagnosed Brancaccio with substance induced mood disorder brought on by Zoloft.

The State rebutted appellant's experts with experts of its own, who testified that appellant was capable of forming the intent to commit murder and kidnapping. They did agree that he suffered from major depression, but were of the opinion that he was not involuntarily intoxicated because of the Zoloft.

Issue

The jury found appellant guilty of first-degree murder (felony murder), and kidnapping. His primary argument on appeal is that the trial court erred in refusing to instruct the jury on his theory of defense, involuntary intoxication.

Reasoning

The defense of involuntary intoxication has been explained . . . as follows:

Generally speaking, an accused may be completely relieved of criminal responsibility if, because of involuntary intoxication, he was temporarily rendered legally insane at the time he committed the offense. And again speaking generally, the courts have considered one to be involuntarily intoxicated when he has become intoxicated through the fault of another, by accident, inadvertence, or mistake on his own part, or because of a physiological or psychological condition beyond his control.

The practice of relieving one of criminal responsibility for offenses committed while in a state of involuntary intoxication extends back to the earliest days of the common law. Involuntary intoxication, it appears, was first recognized as that caused by the unskillfulness of a physician or by the contrivance of one's enemies. Today, where the intoxication is induced through the fault of another and without any fault on the part of the accused, it is generally treated as involuntary. Intoxication caused by the force, duress, fraud, or contrivance of another, for whatever purpose, without any fault on the part of the accused, is uniformly recognized as involuntary intoxication. This is often stated in an exclusive form, that is, that the intoxication is involuntary only if induced by the fraud, etc., of another. Although this implies that intoxication from any other cause is not involuntary, the courts making such a statement do, in fact recognize that intoxication caused in other ways can be involuntary.

Holding

The State first argues that the evidence did not show that appellant was taking Zoloft at the time of the murder. In his taped statement to the police, which was taken three days after the killing, appellant was asked whether he was on any medication and replied that he was taking Zoloft. Appellant had also told one of his medical experts that he thought that he had taken his medicine on the day of the killing. In addition, a friend of appellant had testified that on the day of the killing he had observed appellant's mother make him go into the house in order to take his medication.

The only other argument advanced by the State is that there was no evidence that Zoloft had an adverse reaction on appellant; however, that argument ignores the expert testimony, the mental hospital records, and testimony of people who knew the appellant and observed a personality change in him. . . .

Questions for Discussion

1. What facts does the appellant present in support of the claim that he lacked a criminal intent and was temporarily insane? What is the government's counterargument?
2. As a juror, would you find that the appellant acted in a fashion that is characteristic of an individual who is legally insane? Are you persuaded that his criminal conduct was caused by Zoloft? What is the significance of the fact that only a small percentage of people have a negative side effect to Zoloft?

You Decide

9.2 Robert Low was president and general manager of a trucking company in Springfield, Missouri. Low and his fourteen-year-old stepson, Sane Low, arranged a hunting trip with two friends. The group met in Creede, Colorado, and drove to the campsite. Robert became increasingly disoriented and asked his stepson why he was being "tricked." The drivers of two trucks stopped to check on Robert's health. Robert then demanded that they all kneel in prayer. This was unusual because Robert was not particularly religious. During the remainder of the ride, Robert speculated on whether he was alive or dead. They arrived at the campsite and Robert was convinced that he was dead and had gone to hell. He requested that his tent be set up on a knoll and stated that this would provide the foundation for a divine temple. Robert then accused McCowan of being the devil, and the three others realized that he was disturbed and prevented him from loading his rifle. He then stabbed McCowan in the upper back, and McCowan was taken by some hunters to the hospital. Robert then unsuccessfully attempted to stab himself and poured kerosene on the floor of the tent and ignited a fire. The police arrived and arrested Robert.

Low had ingested forty to fifty cough drops a day for the past several months. He initially took the cough drops to combat a cold and then continued to ingest these as a substitute for chewing tobacco and to help him to quit smoking. On his trip to Colorado, Robert consumed roughly one hundred twenty cough drops within a twenty-four-hour period. A psychiatrist testified that the cough drops contain a drug called dextromethorphan hydrobromide. This caused a psychotic disorder known as "organic delusional syndrome" or "toxic psychosis." The symptoms include a distorted perception of reality, paranoia, hallucinations, and delusions. The psychiatrist testified that Low was incapable of knowing right from wrong at the time of the hunting trip and did not have the ability

to formulate a specific intent to commit a criminal act. A doctor at the Colorado State Hospital testified that Low tested negative for marijuana, alcohol, cocaine, and most other narcotics.

The cough drops were sold over the counter without prescription. The customary warnings included on the label proclaimed, "Not Habit Forming contains 7.5 milligrams of dextromethorphan HBr per lozenge." Robert was charged with first-degree assault that requires a specific intent to cause seriously bodily injury or disfigurement by a dangerous weapon or knowingly engaging in conduct that creates a grave risk of death. Second-degree assault involves recklessly causing serious bodily injury by means of a deadly weapon. Third-degree assault is committed when the accused knowingly or recklessly causes bodily injury to another or with criminal negligence causes bodily injury to another person by means of a deadly weapon. Should the jury have been given an instruction on the defense of involuntary intoxication? Would you convict Low of first-degree assault? See *People v. Low*, 732 P.2d 622 (Colo. 1987).

You can find the answer at www.sagepub.com/lippmanccl2e

See more cases on the study site: People v. Holloway, *www.sagepub.com/lippmanccl2e*

Age

The early common law did not recognize **infancy** as a defense to criminal prosecution. Youthful offenders, however, were typically pardoned. A tenth-century statute softened the failure to recognize infancy as a defense by providing that an individual younger than the age of fifteen was not subject to capital punishment unless he or she made an effort to elude authorities or refused to surrender. A further refinement occurred in the fourteenth century when children younger than seven were declared to be without criminal capacity.

The common law continued to develop and reached its final form by the seventeenth century. Juveniles were divided into three categories based on the capacity of adolescents at various ages to formulate a criminal intent. Individuals were categorized on the basis of their actual rather than their mental age at the time of the offense.[39]

- *Children younger than seven lack a criminal capacity.* There was an *irrebuttable presumption,* an assumption that cannot be overcome by facts, that children younger than seven lack the ability to formulate a criminal intent.
- *Children older than seven and younger than fourteen* were presumed to be without capacity to form a criminal intent. This was a *rebuttable presumption;* the prosecution could overcome the presumption by evidence that the juvenile knew what he or she was doing was wrong. The older the child and the more atrocious the crime, the easier to overcome the presumption. Factors to be considered include the age of the child, efforts to conceal the crime and to influence witnesses, and the seriousness of the crime.
- *Children fourteen and older* possessed the same criminal capacity as adults. Juveniles capable of forming a criminal intent may be prosecuted as adults rather than remain in the juvenile system. Today, the age when a juvenile may be criminally prosecuted as an adult rather than being brought before a juvenile court is determined by state statute. There is no standard approach. One group of states maintains a conclusive presumption of incapacity for juveniles younger than a particular age (usually fourteen); however; other states provide that juveniles regardless of age may be treated as an adult.[40]
- Roughly twenty-five states continue to follow the tripartite common law scheme while modifying the age categories. These states provide that a presumption of incapacity may be overcome when a juvenile is demonstrated to have known the wrongfulness of his or her actions.
- Others specify an age, typically fourteen, younger than which there is a conclusive presumption that a juvenile cannot form a criminal intent.
- A third group of state statutes provides for exclusive jurisdiction by the juvenile court until a specified age. These states typically provide that cases involving individuals between sixteen and eighteen charged with serious crimes may be transferred to adult court.
- Another set of statutes recognizes that the jurisdiction of the juvenile court is not exclusive and that juveniles charged with serious offenses may be subject to criminal prosecution.
- A fifth group of states merely provides that the jurisdiction of the juvenile court does not prevent the criminal prosecution of juveniles.

The common law presumptions of incapacity are not applicable to proceedings in juvenile court because the purpose of the court is treatment and rehabilitation rather than the adjudication of moral responsibility and punishment.[41]

There is a growing trend for state statutes to permit the criminal prosecution of any juvenile as an adult who is charged with a serious offense. These "transfer statutes" adopt various schemes, vesting "waiver authority" in juvenile judges or prosecutors or provide for automatic transfer for specified crimes.[42] The standard to be applied by judges was articulated by the U.S. Supreme Court in *Kent v. United States*. The factors to be considered in the decision whether to prosecute a juvenile as an adult include the seriousness and violence of the offense, the background and maturity of the juvenile, and the ability of the juvenile justice system to protect the public and rehabilitate the offender.[43] The controversial question of certifying juveniles for trial as adults is explored in the next case, *Brazill v. State*.

Can Florida constitutionally prosecute juveniles as adults?

Brazill v. State, *845 So. 2d 282 (Fla. Dist. Ct. App. 2003), Opinion by: Gross, J.*

On the last day of the 1999–2000 school year, thirteen-year-old Nathaniel Brazill shot and killed a teacher at his middle school, Barry Grunow.

The state charged Brazill with first-degree murder and aggravated assault with a firearm. The jury convicted him of second-degree murder and aggravated assault with a firearm. The trial judge sentenced him to concurrent sentences: a mandatory minimum sentence of twenty-eight years in prison on the murder charge and five years in prison, with a three year mandatory minimum, on the assault charge.

We affirm in all respects.

Facts

In the early afternoon of May 26, 2000, Brazill and Michelle Cordovaz were suspended for the remainder of the day as the result of a water balloon fight. School counselor Kevin Hinds escorted the two students off campus. Brazill asked Hinds what time he was going home. Hinds indicated that he was leaving around 4:15 to 4:30 P.M. and asked why Brazill wanted to know. Brazill shrugged and did not respond.

As he was walking away with Cordovaz, Brazill told her that he had a gun and was going to return to shoot Hinds. Cordovaz asked: "You wouldn't do that, Nate, would you?" Brazill answered: "Watch. I'm going to be all over the news."

On the way home, Brazill made several stops. Near his grandmother's house, Brazill spoke to Brandon Spann. He asked if Spann was part of a gang or had a gun. Spann asked him why he needed a gun. Brazill replied that he was "going to fuck up the school" because of the suspension.

At his home, Brazill retrieved a gun from his bedroom. The previous weekend, Brazill was at his grandfather's house and found the gun in a cookie jar in his grandfather's bureau. At that time, he loaded the gun, pulled the slide back, engaged the safety, and placed it in his overnight bag. When Brazill left his grandfather's house, he took the gun home with him; upon returning home he hid the gun in his room.

Taking the gun from his bedroom, Brazill rode his bike back to school. On the way, he stopped by his aunt's house and left a note.

Brazill entered the school grounds near the rear parking lot, a designated teachers' area. School security officer Matt Baxter saw him. Baxter followed him, but found only an abandoned bike. After leaving his bike, Brazill ran to the school building. On the way, he advised a student sitting outside to go home.

Once inside the school, Brazill went directly to Barry Grunow's classroom to speak with two friends, Dinora Rosales and Vonae Ware. He had once dated Ware for a time, and was romantically interested in Rosales. Earlier in the day, Brazill gave Rosales two cards and a bouquet of flowers.

When Brazill knocked on Grunow's door, the students in the class were already standing, because they were about to go outside. Brazill sternly asked to speak to Rosales and Ware, who were standing on either side of Grunow. The teacher did not allow the girls to leave the classroom, but said that Brazill could come inside. Brazill refused to enter the classroom. Three more times he asked to see the girls. Each time Grunow calmly declined and told him to go back to class.

Brazill then pulled out the gun and aimed it at Grunow's head. He was in the hallway, approximately an arm's length from Grunow. He backed up slightly and assumed a shooter's stance with his legs apart.

Grunow told Brazill to stop pointing the gun, but he continued to point the gun at the teacher's head. Brazill appeared to be angry but calm; he was not crying or shaking. Brazill pulled the slide back on the gun.

[A crime scene investigator testified that pulling the slide back on this gun put a bullet in the chamber. If a

bullet was already in the chamber when the slide was pulled, then a live round would eject. At the crime scene, the investigator found a live cartridge, along with a discharged shell casing.]

As Grunow attempted to close the classroom door, Brazill pulled the trigger and Grunow fell to the floor, with a gunshot wound between the eyes. A school surveillance videotape of the hallway revealed that Brazill had pointed the gun at Grunow for nine seconds before shooting. Brazill exclaimed: "Oh s__t," and fled.

On the way out, Brazill used both hands to aim the gun at math teacher, John James, who was conducting class next door to Grunow. As Brazill aimed the gun, he told James not to bother him, that he was going to shoot. James immediately turned around and led his students back into his classroom.

Brazill ran out of the building. To one teacher, Brazill did not appear to be visibly upset. He was not sweating. He was not crying. Near the school, Officer Michael Mahoney observed Brazill walk into the street, put his hands on his head, and kneel. When the officer asked what he was doing, Brazill stated that he had shot someone at school and the gun was in his pocket. Brazill was then arrested. He acknowledged that he had shot Grunow. Brazill was taken to the police station, where he gave a videotaped statement.

A firearms expert with the FBI testified that the gun used in the shooting had a safety that functioned normally. The gun had a trigger pull that required five and one-half pounds of pressure to fire. It would not discharge unless the trigger was pulled.

Issue

Brazill argues that Florida Statutes (FS) section 985.225 (1999) is unconstitutional as a violation of due process, equal protection, and separation of powers. In pertinent part, section 985.225 provides:

> (1) A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the [juvenile] court . . . unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult:
>
> (a) On the offense punishable by death or by life imprisonment; and
>
> (b) On all other felonies or misdemeanors charged in the indictment which are based on the same act or transaction as the offense punishable by death or by life imprisonment or on one or more acts or transactions connected with the offense punishable by death or by life imprisonment.
>
> (2) . . .
>
> (3) If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. If the juvenile is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he or she was indicted as a part of the criminal episode, the court [also] may sentence [as an adult]. . . .

Reasoning

Brazill first contends that his due process rights were violated because he was denied the "rehabilitative aspect of juvenile court" solely because the state decided to procure an indictment as an adult. However, there is no absolute right conferred by common law, constitution, or otherwise, requiring children to be treated in a special system for juvenile offenders. . . . Under article I, section 15(b) of the Florida Constitution, a "child," as defined by "law," may be charged "with a violation of law as an act of delinquency instead of [a] crime." As our supreme court has explained, this provision means that "a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature. . . ."

Holding

Florida Statutes section 985.225 is related to the state's interest in crime deterrence and public safety. The statute provides treatment as an adult for those offenses serious enough to be punishable by life imprisonment or death. Such crimes are the most violent or dangerous offenses against persons. It is not unreasonable for the state legislature to treat children who commit serious crimes as adults in order to protect societal goals. The legislature could reasonably have determined that for some crimes the rehabilitative aspect of juvenile court must give way to punishment. . . . [T]he Florida legislature "considered carefully the rise in the number of crimes committed by juveniles as well as the growing recidivist rate among this group. The legislature was entitled to conclude that the . . . juvenile system would not work for certain juveniles, or that society demanded greater protection from these offenders than that provided by that system."

Raising a procedural due process argument, Brazill cites *Kent v. United States,* 383 U.S. 541 (1966), to support his argument that a hearing is required before adult sanctions may be imposed upon a child. He attacks FS section 985.225 because it allows the state to bypass a hearing on the suitability of adult sanctions by securing an indictment. . . .

Florida Statutes section 985.225 does not require a court to hold a hearing to decide whether adult sanctions are appropriate. . . . [T]he Florida supreme court discussed *Kent* and found that: "Whatever its constitutional

ramifications, we do not believe they extend to the statutory provision under consideration here where discretion to prosecute a juvenile as an adult is vested in the prosecutor rather than in a judge." . . . Brazill was afforded the same procedural rights as anyone else charged with first-degree murder by indictment. Due process does not require anything more because of his status as a child.

Brazill complains that because the statute contains no criteria "to steer prosecutorial discretion," arbitrariness is injected into the decision-making process. . . . These attacks must fail because of the broad discretion accorded a prosecutor under our legal system. As the Florida Supreme Court has written, "the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice." Florida Statutes section 985.225(1) applies to "[a] child of any age who is charged with a violation of state law punishable by death or by life imprisonment." . . . It does not differentiate between age groups. The statute equally applies to any child who commits an offense punishable by death or by life imprisonment. Additionally, a child transferred to the criminal court becomes similarly situated with defendants in that court, rather than those still in the juvenile system. . . . [T]he state points out, the statutory "requirement of an indictment is for the protection of the accused juvenile," because the grand jurors must concur in the prosecutor's charging decision. When the grand jury does not return an indictment, a juvenile thirteen and under is not subject to FS section 985.226(2).

Holding

The twenty-eight year mandatory minimum sentence was lawful. The jury's verdict was sufficient to support the mandatory minimum sentence. An enhanced sentence is proper when it is based on a jury verdict that specifically refers to the use of a firearm, either as a separate finding or by including a reference to a firearm when identifying the specific crime. . . .

Florida Statutes section 775.087(2)(a) provides that if during the course of the commission of the felony such person discharged a "firearm" . . . and, as a result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison. The indictment in this case charged the crime of first-degree murder and alleged that Brazill "did use and have in his possession a handgun, a firearm as defined in Florida Statutes section 790.001(6)." . . .

Questions for Discussion

1. As a prosecutor, would you have treated the thirteen-year-old Brazill as an adult?
2. What is the basis for the Florida court's conclusion that Brazill does not possess a constitutional right to be treated as a juvenile?
3. Brazill argues that he should be given a hearing to determine whether he should be treated as an adult. The court, however, ruled that this decision was within the discretion of the prosecutor and that Brazill was protected by the fact that a grand jury of ordinary citizens determined that there was sufficient evidence to indict him for murder. Is it preferable to have an individual's adult status determined by a court or by a prosecutor?

The next case, *State v. J.P.S.,* discusses the factors considered by the Washington Supreme Court in determining whether a juvenile was capable of forming a criminal intent.

Did eleven-year-old J.P.S. know that it was wrong to rape his three-year-old playmate?

State v. J.P.S., *954 P.2D 894 (WASH. 1998), Opinion by: Guy, J.*

Issue

In this case, we are asked to review a superior court's conclusion that a child had the capacity to commit an offense that, if committed by an adult, would be a crime. We are also asked to clarify what the State must prove in order to overcome the statutory presumption that a young child is incapable of committing a crime.

Facts

The State charged eleven-year-old J.P.S. (hereafter J.P.) with rape of a child in the first degree in violation of Washington Revised Code section 9A.44.073. The charge was based upon an alleged act of intercourse between J.P. and his three-year-old playmate, M. Because J.P. was under the age of twelve at the time of the alleged

offense, the superior court held a capacity hearing to determine whether he was capable of committing the crime charged. The trial court found, in spite of the fact that J.P. was mentally retarded, that he had the capacity to understand the prohibited act and its wrongfulness and could be tried for the offense of first-degree rape of a child. The Court of Appeals accepted discretionary review of the capacity determination prior to any determination on guilt and reversed the finding of capacity, holding the evidence was insufficient to rebut the statutory presumption of incapacity.

Reasoning

We affirm the Court of Appeals decision in this case but clarify that it is not necessary for the State to prove that a child understands the illegality or the legal consequences of an act in order to prove capacity. The inquiry is whether the child had sufficient capacity to (1) understand the act and (2) know that it was wrong.

At common law, children below age seven were conclusively presumed to be incapable of committing a crime and children over the age of fourteen were presumed to be capable. Children between those ages were rebuttably presumed incapable of committing a crime. Washington codified these presumptions, changing the age of incapacity to seven and younger and the age of presumed capacity to twelve and older. Washington Revised Code section 9A.04.050 provides, in pertinent part, that children between the ages of seven and twelve are presumed incapable of committing a crime:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

This statute applies to juvenile adjudications, and the State has the burden to rebut the presumption of incapacity by clear and convincing evidence. A capacity determination must be made in reference to the specific act charged. The legal test is whether J.P. had knowledge of the wrongfulness of the act at the time he committed the offense and not that he realized it was wrong after the fact. Capacity must be found to exist separate from any mental element of the offense. Capacity is not an element of the crime; rather it is a general determination that the child understood the act and its wrongfulness.

In the instant case, the Court of Appeals concluded that the State must prove the child not only understood the nature of the act and that it was wrong, but also that it was punishable in court. We disagree. The statute requires that a child have "sufficient capacity to understand the act or neglect, and to know that it was wrong" in order to rebut the presumption of incapacity. It does not require that the child know the act was illegal or understand the legal consequences of the act. The Legislature has chosen to frame the test as a capacity to understand the conduct was wrong. We decline to add to the statute the requirement that the State prove the child understood the act was "illegal." We do emphasize that the nature of the offense charged is an important factor to be considered when determining the capacity of a child. When a child is accused of a crime that involves sexual misconduct, it is more difficult for the State to prove the child understood the conduct was wrong. It is very difficult to tell if a young child, particularly one who is developmentally disabled, understands the prohibitions on sexual behavior with other children.

Therefore, the question in this case is whether there is clear and convincing evidence introduced at the capacity hearing that J.P. understood the act of sexual intercourse and knew it was wrong at the time the alleged conduct occurred. The following factors may be relevant in determining whether a child knew the act he or she committed was wrong: (1) the nature of the crime; (2) the child's age and maturity; (3) whether the child showed a desire for secrecy; (4) whether the child admonished the victim not to tell; (5) prior conduct similar to that charged; (6) any consequences that attached to the conduct; and (7) acknowledgment that the behavior was wrong and could lead to detention. Also relevant is testimony from those acquainted with the child and the testimony of experts. A child's age, maturity, experience, and understanding may all be relevant in deciding if a given child had knowledge of the act's wrongfulness at the time it was committed.

Testimony at the capacity hearing in this case showed that J.P. is a mentally retarded child who tested at the level of a first grader and had limited cognitive skills. At that hearing, testimony was offered by the alleged victim's (M.'s) father; a sergeant of the Selah Police Department; the assistant-principal at J.P.'s school; J.P.'s fifth-grade teacher; a probation officer for Yakima County; and J.P.'s mother.

The alleged victim's father testified that his five-year-old son and three-year-old daughter were playing in the yard with their neighbor, J.P., when the son reported that his sister, M., and J.P. were playing in a shed some distance from the house. The father testified that when he entered the shed, M. had the top of her bathing suit pulled down and that J.P.'s pants were unfastened. He told J.P. to leave and took his daughter to his wife who examined her and, finding no evidence of trauma, did not take her to the doctor. He stated that M. told him that J.P. had asked her to take her clothes off and that he had touched her on the vagina.

M.'s father notified the police. The investigating officer talked with J.P. three times. He reported J.P. appeared a little nervous when he first talked with him on the evening of the incident. The officer told J.P. he was investigating a crime to do with M. J.P. first said he had not seen M. that evening but then said he had been playing with her and her brother. He said that M. had been dressed. The officer told J.P. that it was "against the law to lie to a police officer and that he could be arrested for obstructing if he was." The officer testified that M.'s five-year-old brother

had told another officer that he had been looking for J.P. and M. and had entered the shed, and that J.P. had pulled up his pants and had told him to leave. M.'s brother then told his father that J.P. and M. were in the shed.

Approximately a month later, the officer again met with J.P. and read him his *Miranda* warnings. He testified that J.P. appeared nervous and they only had a brief conversation without any factual information about the event. About a week later, the officer again interviewed J.P. at police headquarters and again read J.P. the *Miranda* warnings. After J.P.'s mother left the room, J.P. made a taped statement in which he admitted M. took off her clothes, he pulled down his pants, and he touched M.'s vagina with his finger and slightly penetrated her vagina with his penis for "half a second." J.P. stated at the end of the statement that "I'm sorry for what I done, I know it was bad and I feel real guilty about it."

J.P.'s fifth-grade teacher testified that she had J.P. in her class for approximately half of the day and that he attended special education classes for three periods a day. She testified that when she taught him, she taught material that would be equivalent to a first- or second-grade level. She stated that he had been taught first-grade material from first through the fifth grade and still remained at the first-grade level. She testified that J.P. was not a discipline problem. She stated that if J.P. was taught things in repetition, he could eventually attain a concept. The teacher testified that the assistant-principal had taught the human sexuality class to the boys in her fifth-grade class during the year that J.P. was in the fifth grade. She stated that only physiology and anatomy were taught and not the "appropriateness" of sexual behavior.

The assistant-principal testified that he did teach a one-week class to fifth graders regarding human reproduction but not the social interaction dealing with boy/girl relationships. He testified that he had never had an occasion to teach J.P. or had a class with him. He testified that on tests in the areas of vocabulary, word recognition, reading comprehension, math concepts, problem solving, math computation, spelling, language, science, social studies, total reading, total math, total language, and total battery, J.P. scored at the first-grade level. He testified that J.P. was able to converse and was polite and friendly. He stated that the psychological reports indicated that J.P. had limited cognitive skills and that he was mildly mentally retarded.

A Yakima County probation officer interviewed J.P. for an "underage referral" and directed her report to the prosecutor's office. She testified that she felt J.P. did understand the terms penis and vagina, but that he did not understand what rape meant and did not understand whether the act was right or wrong. She specifically stated that she did not think at the time J.P. allegedly committed the act with M. that he knew what he was doing was wrong. Her opinion was that J.P. did not begin to understand that what he was doing was wrong until M.'s father came into the shed and ordered him to leave. She testified that during the interview J.P. at times would appear to be mentally at age eleven and then his level would appear to be that of a three-year-old, and that he appeared to have a hard time concentrating.

J.P.'s mother testified that she did not believe J.P. knew at the time that what he was doing was wrong. She testified that he could not read or write, and that he had been in special education since he had started school and that he only learned things after much repetition. She testified that although she had taught J.P. to cover himself when getting out of the bath, she had never taught him about sexuality because he had never shown any interest and that he plays and acts at a younger level than his age. She testified that often at school he was elsewhere than in the regular curriculum, and that she did not know whether he ever attended any sexual education or "good touch, bad touch" classes from the first through the fifth grade. She testified there had been some sexual education for sixth graders that she thought had confused J.P.

The court concluded the State had met its burden of rebutting the presumption of incapacity and held that J.P. could be tried for first-degree rape of a child. The Court of Appeals reversed the finding of capacity. The appeals court noted that the probation officer had concluded J.P. did not understand what rape meant or that it was wrong, that his teacher and assistant-principal had testified that the reproductive process and inappropriate touching were taught at school but they did not testify that J.P. had attended these lessons in light of the fact that he was removed from regular classes half of each school day. The Court of Appeals concluded it was not clear that J.P. understood his conduct manifested sexual intercourse. It was noted that the fact that J.P. was mentally retarded added to the difficulty of proving he understood the wrongfulness of his conduct. The appeals court concluded that although J.P. had acknowledged in his statement that what he had done was "bad," the statement was made after he had been repeatedly accused of a crime by the police. The court concluded the State had not met its burden to rebut the presumption of incapacity. We agree.

After a complete review of the record, we conclude the Court of Appeals is correct that the trial court's finding that J.P. attended sex education classes is not supported by the record. While most students in the regular curriculum did attend "good touch, bad touch" classes, there was no evidence that J.P. ever attended any of those classes. The testimony was that J.P. was in a "pull-out model" in which he was taken out of regular classes for approximately half of each day and placed in special education classes. There is no evidence that there was any sex education taught in the special education classes. The evidence indicates that J.P. did not attend the sex education classes in his fifth-grade year. His teacher testified that the assistant-principal taught the human sexuality class to the fifth-grade boys during that year, and the assistant-principal could not recall ever having had a class with J.P. While J.P. may have attended some sex education classes, there was no evidence in the record

that he did so. Even if he had attended some classes, his teacher's and his mother's testimony was that he learned concepts only after much repetition.

Holding

Consideration of the factors that have been approved by Washington courts to determine if a child understands the wrongfulness of conduct provides little support for the conclusion that J.P. knew at the time of the alleged offense that his conduct was wrong. The nature of the act was sexual intercourse. It is very difficult to tell if a young child, particularly one who is developmentally disabled, understands the prohibitions on sexual behavior with other children. Several decisions have correctly recognized that it may be more difficult to prove that a child understood a sexual offense than a crime such as stealing or setting a fire. Most young children are taught very young not to steal or set fires or injure other people, but often young children have little, if any, instruction regarding prohibitions on sexual conduct. While J.P. was eleven years old at the time of the alleged crime, his maturity level was much lower. J.P. did show some desire for secrecy or privacy when he sent M.'s brother away, and he did at first tell the officer that M. had remained dressed while they played. However, there is no evidence that J.P. admonished M. not to tell about what happened. There is no evidence that J.P. had ever engaged in any similar conduct in the past or had ever been punished for any inappropriate sexual behavior. The record shows J.P. had never had any prior contact with the police and was not considered to be a discipline problem at school. While he did acknowledge his conduct was "bad" and that he felt guilty, this admission was only made after he was repeatedly interrogated by the police, given repeated *Miranda* warnings and had been shunned by his neighbors and classmates. The recognition of wrongful conduct made by a child after the child has been taught that his or her conduct was wrong is not particularly probative of whether the child understood conduct was wrong at the time it occurred. A child's after-the-fact acknowledgment that he or she understood the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence. The record reflects no prior training or education of J.P. about sexually prohibited behavior. It shows J.P. had never previously been in trouble for any sexually inappropriate conduct. Further, it shows that J.P. has limited cognitive ability and generally functions at the level of a first grader.

We agree with the Court of Appeals that the State failed to show by clear and convincing evidence that J.P. understood the act of sexual intercourse or that it was wrong. We affirm the Court of Appeals holding that reversed the finding of capacity.

Questions for Discussion

1. What is the issue in *J.P.S.* and the holding of the Washington Supreme Court?
2. Explain the legal standard that the Washington court used for determining whether J.P. knew that the rape was wrong.
3. What facts were relied on by the Washington court to support the conclusion that the State failed to show by clear and convincing evidence that J.P. "understood the act of sexual intercourse or that it was wrong"?
4. As a prosecutor, are there facts that you could point to as indicating that J.P. understood that his act of sexual intercourse was "wrong"?

You Decide

9.3 The Ramer family was temporarily living with the Briscoes. Andrew Ramer, age eleven, freely admitted having sodomized Z.P.G Briscoe, age seven, on four occasions over a two-week period. He also revealed that he had sodomized Z.P.G several years earlier and that he had had sexual contact with his nine-year-old sister. Ramer was charged with two counts of the rape of a child. He told the police that sodomy was "kind of sort of wrong" and then qualified this with the statement that it was not wrong "because he was into it." Ramer cited as behavior that was wrong, "to steal, murder, or poach." In Washington, a child younger than twelve is presumed incapable of committing any crime. This presumption may be overcome by clear and convincing evidence that the child possessed the capacity to understand the nature of his act and to know that it was wrong. Factors to consider include the age of the child, seriousness of the crime, whether the child made an effort to conceal the crime, and whether the child suffered consequences for committing the crime in the past. Ramer's biological father is incarcerated for molesting Ramer's sister, and his stepfather committed suicide after learning that he would be prosecuted for molesting Ramer's sister. There was evidence that either the police or the local social welfare authorities had intervened in response to an earlier allegation of abuse, and that Ramer had been lectured by his parents at the time that it was wrong for children to have sexual contact with one another. The experts who examined Ramer generally concluded that he lacked the capacity to understand that sodomy was wrong. Should Ramer be prosecuted as an adult? See *State v. Ramer,* 86 P.3d 132 (Wash. 2004).

You can find the answer at www.sagepub.com/lippmanccl2e

Duress

The common law excused an individual from guilt who committed a crime to avoid a threat of imminent death or bodily harm. In several seventeenth- and eighteenth-century cases involving treason or rebellion against the king, defendants were excused who joined or assisted the rebels in response to a threat of injury or death. The common law courts stressed that individuals were obligated to desert the rebels as soon as the threat of harm was removed.[44]

There are various explanations for the **duress** defense:

- *Realism.* The law cannot expect people to act in a heroic fashion and resist threats of death or serious bodily harm.
- *Criminal Intent.* An individual who commits a crime in response to a severe threat lacks a criminal intent.
- *Criminal Act.* Individuals who commit crimes under duress act in an involuntary rather than voluntary fashion.

Realism may be the most persuasive justification for duress. An English court nicely captured this concern in the observation that in the "calm of the courtroom measures of fortitude or of heroic behavior are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well-disposed."[45]

The Elements of Duress

The defense of duress involves several central elements.

The defendant's actions are to be judged in accordance with a reasonable person standard. In *State v. Van Dyke,* the defendant Sheryl Van Dyke was a thirty-four-year-old mother of two who had been married for fifteen years. She was convicted of the sexual assault and endangerment of the welfare of J.M., a thirteen-year-old male with whom she had a sexual affair. Van Dyke claimed that she entered into and continued the relationship out of fear resulting from J.M.'s periodic physical abuse and threats to seriously assault her daughter and to choke her son to death. A New Jersey Superior Court ruled that society could reasonably expect that the will of the average member of the community would not be overwhelmed by the type of threats directed at Sheryl Van Dyke and her family.[46]

There must be a threat of death or serious bodily harm that causes an individual to commit a crime. Most states also recognize that a threat directed against a member of the defendant's family or a third party may constitute duress. Psychological pressure or blackmail does not amount to a threat for purposes of duress.

Duress does not excuse the intentional taking of the life of another. In the California case of *People v. Anderson,* the defendant Robert Anderson, along with Ron Kiern, abducted Margaret Armstrong, who was suspected of molesting Kiern's daughter. Anderson testified that when he objected to Kiern's request that Anderson give him a rock with which to beat Armstrong, Kiern responded "give me the rock or I'll beat the s____ out of you." The defendant testified that he gave Kiern the rock because he was "not 'in shape' to fight" and he feared that if he refused, Kiern would "punch me out, break my back, break my neck." The California Supreme Court held that the intentional taking of a life was not excused by duress and that the law "should require people to choose to resist rather than kill an innocent person." The majority opinion noted that California is "tormented by gang violence" and "persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting."[47]

The threat must be immediate and imminent. Judges have insisted on an imminent threat that compels an individual to "involuntarily" commit a crime; a threat of future harm is not considered to prevent an individual from making a reasoned choice whether to violate the law. In *Commonwealth v. Perl,* the defendant, Dr. Alan Perl, was a physician who provided LaCorte, described as a "longtime criminal," with prescriptions and pills after LaCorte mentioned in August 1993 that he knew where Perl's daughter attended school. This was followed by threats in January, March, and July 1994. On the last occasion, LaCorte told Perl that if he did not provide him with pills that "I will see your daughter." Perl continued to provide LaCorte's pills between August 1993 and October 1994. The Massachusetts Appeals Court denied Perl the defense of duress because LaCorte's threats were of future harm and were not "present, immediate, and impending."[48]

An individual must have exhausted all reasonable and available alternatives to violating the law. A defendant must reasonably believe that the criminal act is the only means of preventing imminent death or great bodily harm. Jon Barreau hit Robert Hansen with a bat, knocking him to the floor. Barreau's bat broke, and he directed Jeffery Keeran to hit Hansen "or I'm hitting you." Keeran testified that he grabbed the bat with two hands and struck Hansen twice and then went outside and vomited and waited roughly forty-five minutes for Keeran to complete the robbery. A Wisconsin appellate court noted that Keeran offered no explanation of why he did not run out the back door, threaten Barreau, refuse to hit Hansen, or object that Hansen already was incapacitated. Judge Stuart Schwartz recognized that Keeran was afraid of Barreau, but nevertheless stressed that the duress defense requires that a criminal act is the "only course" and that duress is not a "license to take the safest course." Keeran reasonably believed that Barreau would hunt him down if he refused to cooperate in the criminal enterprise. This, however, would not support a finding of duress, which requires the prevention of "imminent" death or great bodily harm.[49]

The defendant must not create or assist in creating the circumstances leading to the claim of duress. An individual must not intentionally or recklessly become involved in an enterprise in which it is foreseeable that he or she will be coerced into criminal activity. Drug dealer Luis Rafael Santiago Rodriquez approached Ceasar Castro Gomez and insisted that Castro "solve his transportation problem." Castro testified that he felt threatened and drove with Santiago and one of his lieutenants to the dock where they boarded Castro's boat to retrieve the drugs. Castro testified that he managed to frustrate the sale by deliberately steering the boat far from the drop point for the drugs. He was subsequently threatened by Santiago and feared that he would be killed. Several days later, Castro agreed to meet Santiago at a local pizza parlor where Castro testified that he again was intimidated into cooperating with the drug dealers. Castro was apprehended several miles off the coast of Puerto Rico while piloting two other passengers in a ship carrying roughly 762 kilograms of cocaine and was charged with various drug offenses. The First Circuit Court of Appeals concluded that by returning to the pizza parlor, Castro "recklessly placed himself in a situation in which it was probable that he would be subjected to duress" and that he was not entitled to raise the duress defense.[50]

Married women were exempted from liability under the common law. The common law presumed that a woman who committed a crime in the presence of her husband acted under his direction and she was not responsible. This is no longer the law.

Keep in mind that the individual exerting the coercion is liable as a principal in the crime despite the fact that the perpetrator may be excused on the basis of duress.

Duress and Correctional Institutions

The most controversial duress cases involve prison escapes in which inmates threatened with physical assault offer the defense of duress to excuse their escape. In *State v. Unger,* the defendant Francis Unger, a twenty-two-year-old full-blooded Crete Indian, pled guilty to a theft charge and was imprisoned for one to three years in Stateville Penitentiary in Joliet, Illinois. During the first two months of Unger's imprisonment, he was threatened by an inmate wielding a six-inch knife who demanded that the defendant engage in homosexual activity. Unger was transferred to a minimum security honor farm and one week later was beaten and sexually assaulted by a gang of inmates.

Unger was warned against informing authorities and several days later received a phone call informing him that he would be killed in retribution for having allegedly contacted correctional officials. Unger responded by escaping from the dairy farm and he was apprehended two days later while still wearing his prison clothes. He claimed that he had intended to return to the institution.

The court determined that the correctional system was dominated by gangs that were too powerful to be controlled by prison officials. Unger, under these circumstances, was entitled to a jury instruction on duress because he may have reasonably believed that he had no alternative other than to escape or to be killed or to suffer severe bodily harm. The Illinois appellate court held that it was unrealistic to require that a prisoner wait to escape until the moment that he was being "immediately pursued by armed inmates" and it was sufficient that Unger was threatened that he would be dead before the end of the evening.[51]

Inmates relying on duress must establish that they did not use force or violence toward prison personnel or other innocent individuals in the escape and that they immediately contacted authorities once having reached a position of safety. *Unger* is only one of a number of cases that have recognized that inmates are entitled to rely on duress. Do you believe that the judiciary acted correctly in recognizing Unger's claim of duress? Are you confident that he was "telling the truth"? What about his failure to "turn himself in" to correctional authorities?

The Duress Defense

The defense of duress is not fully embraced by all commentators. The famous nineteenth-century English commentator Sir James Stephen argued that the law should stand firm against human frailty and weakness and insist that individuals follow legal rules, even under conditions of stress and strain. Sir James also contended that duress opens the door to individuals committing crimes and later claiming that they had been threatened and were entitled to the defense of duress. In the last analysis, critics argue that the law should encourage people to resist rather than conform to the demands of violent and forceful individuals. Do you agree?

The Statutory Standard

Consider the Iowa statute on duress.

Iowa Code Section 704.10. Compulsion

No act, other than an act by which one intentionally or recklessly causes physical injury to another, is a public offense if the person so acting is compelled to do so by another's threat or menace of serious injury, provided that the person reasonably believes that such injury is imminent and can be averted only by the person doing such an act.

Model Penal Code

Section 2.09. Duress

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense . . . is unavailable if the actor recklessly . . . [or negligently] placed himself in such a situation. . . .

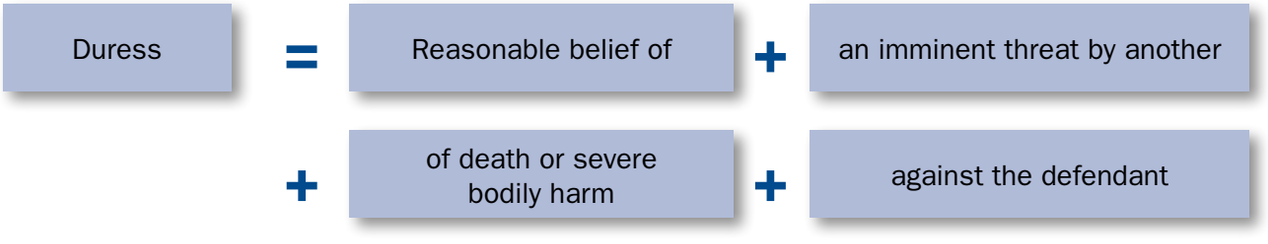
(3) It is not a defense that a woman acted on the command of her husband. . . .

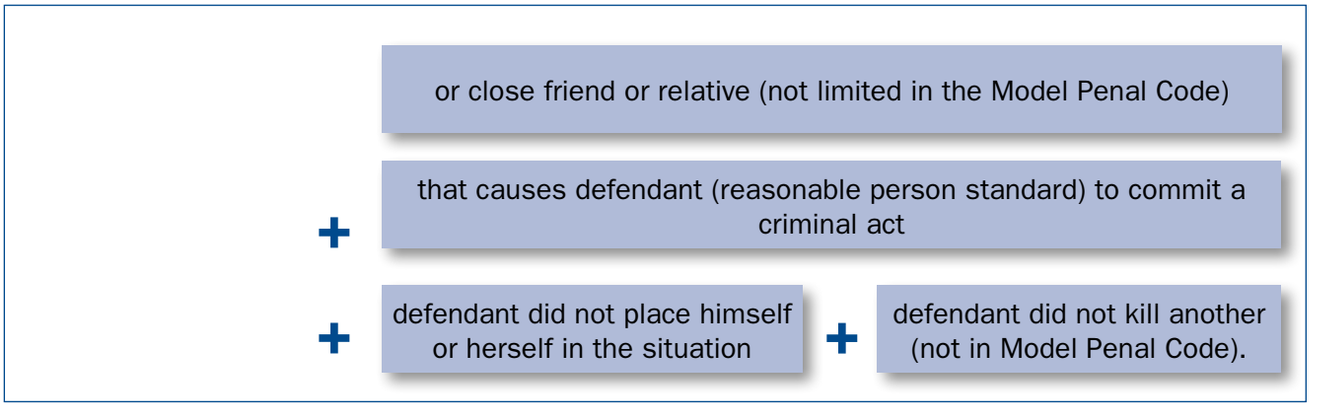
Analysis

The Model Penal Code significantly amends the common law standard:

1. The threat need not be limited to death or serious bodily harm. The commentary provides for a threat of unlawful force against the individual or another that would coerce an individual of "reasonable firmness" in the defendant's situation. Only threats to property or reputation are excluded in the commentary.
2. The threat is not required to be imminent or immediate.
3. Duress may be used as an excuse for homicide.
4. The threat may be to harm another person and is not limited to friends or relatives.

The Legal Equation





Was the defendant threatened with immediate harm by the drug dealer?

United States v. Contento-Pachon, *723 F.2D 691 (9TH CIR. 1984), Opinion by: Boochever, J.*

This case presents an appeal from a conviction for unlawful possession with intent to distribute a narcotic controlled substance in violation of 21 U.S.C. § 841(a)(1) (1976). At trial, the defendant attempted to offer evidence of duress and necessity defenses. The district court excluded this evidence on the ground that it was insufficient to support the defenses. We reverse because there was sufficient evidence of duress to present a triable issue of fact.

Facts

The defendant-appellant, Juan Manuel Contento-Pachon, is a native of Bogota, Colombia and was employed there as a taxicab driver. He asserts that one of his passengers, Jorge, offered him a job as the driver of a privately owned car. Contento-Pachon expressed an interest in the job and agreed to meet Jorge and the owner of the car the next day.

Instead of a driving job, Jorge proposed that Contento-Pachon swallow cocaine-filled balloons and transport them to the United States. Contento-Pachon agreed to consider the proposition. He was told not to mention the proposition to anyone, otherwise he would "get into serious trouble." Contento-Pachon testified that he did not contact the police because he believes that the Bogota police are corrupt and that they are paid off by drug traffickers. Approximately one week later, Contento-Pachon told Jorge that he would not carry the cocaine. In response, Jorge mentioned facts about Contento-Pachon's personal life, including private details that Contento-Pachon had never mentioned to Jorge. Jorge told Contento-Pachon that his failure to cooperate would result in the death of his wife and three-year-old child.

The following day the pair met again. Contento-Pachon's life and the lives of his family were again threatened. At this point, Contento-Pachon agreed to take the cocaine into the United States. The pair met two more times. At the last meeting, Contento-Pachon swallowed 129 balloons of cocaine. He was informed that he would be watched at all times during the trip, and that if he failed to follow Jorge's instruction he and his family would be killed.

After leaving Bogota, Contento-Pachon's plane landed in Panama. Contento-Pachon asserts that he did not notify the authorities there because he felt that the Panamanian police were as corrupt as those in Bogota. Also, he felt that any such action on his part would place his family in jeopardy. When he arrived at the customs inspection point in Los Angeles, Contento-Pachon consented to have his stomach x-rayed. The x-rays revealed a foreign substance that was later determined to be cocaine.

At Contento-Pachon's trial, the government moved to exclude the defenses of duress and necessity. The motion was granted. We reverse.

Issue

There are three elements of the duress defense: (1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm. . . . Sometimes a fourth element is required: The defendant must submit to proper authorities after attaining a position of safety. . . . Fact finding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law. . . . If the evidence is insufficient as a matter of law to support a duress defense, however, the trial court should exclude that evidence.

The trial court found Contento-Pachon's offer of proof insufficient to support a duress defense because he failed to offer proof of two elements: immediacy and inescapability.

Reasoning

We examine the elements of duress.

Immediacy: The element of immediacy requires that there be some evidence that the threat of injury was present, immediate, or impending. "[A] veiled threat of

future unspecified harm" will not satisfy this requirement. The district court found that the initial threats were not immediate because "they were conditioned on defendant's failure to cooperate in the future and did not place defendant and his family in immediate danger."

Evidence presented on this issue indicated that the defendant was dealing with a man who was deeply involved in the exportation of illegal substances. Large sums of money were at stake and, consequently, Contento-Pachon had reason to believe that Jorge would carry out his threats. Jorge had gone to the trouble to discover that Contento-Pachon was married, that he had a child, the names of his wife and child, and the location of his residence. These were not vague threats of possible future harm. According to the defendant, if he had refused to cooperate, the consequences would have been immediate and harsh.

Contento-Pachon contends that he was being watched by one of Jorge's accomplices at all times during the airplane trip. As a consequence, the force of the threats continued to restrain him. Contento-Pachon's contention that he was operating under the threat of immediate harm was supported by sufficient evidence to present a triable issue of fact.

Escapability: The defendant must show that he had no reasonable opportunity to escape. . . . The district court found that because Contento-Pachon was not physically restrained prior to the time he swallowed the balloons, he could have sought help from the police or fled. Contento-Pachon explained that he did not report the threats because he feared that the police were corrupt. The trier of fact should decide whether one in Contento-Pachon's position might believe that some of the Bogota police were paid informants for drug traffickers and that reporting the matter to the police did not represent a reasonable opportunity of escape.

If he chose not to go to the police, Contento-Pachon's alternative was to flee. We reiterate that the opportunity to escape must be reasonable. To flee, Contento-Pachon, along with his wife and three-year-old child, would have been forced to pack his possessions, leave his job, and travel to a place beyond the reaches of the drug traffickers. A juror might find that this was not a reasonable avenue of escape. Thus, Contento-Pachon presented a triable issue on the element of escapability.

Surrender to Authorities: As noted above, the duress defense is composed of at least three elements. The government argues that the defense also requires that a defendant offer evidence that he intended to turn himself in to the authorities upon reaching a position of safety. Although it has not been expressly limited, this fourth element seems to be required only in prison escape cases. Under other circumstances, the defense has been defined to include only three elements. . . .

Holding

In cases not involving escape from prison, there seems little difference between the third basic requirement that there be no reasonable opportunity to escape the threatened harm and the obligation to turn oneself in to authorities on reaching a point of safety. Once a defendant has reached a position where he can safely turn himself in to the authorities he will likewise have a reasonable opportunity to escape the threatened harm.

That is true in this case. Contento-Pachon claims that he was being watched at all times. According to him, at the first opportunity to cooperate with authorities without alerting the observer, he consented to the x-ray. We hold that a defendant who has acted under a well-grounded fear of immediate harm with no opportunity to escape may assert the duress defense, if there is a triable issue of fact whether he took the opportunity to escape the threatened harm by submitting to authorities at the first reasonable opportunity.

Contento-Pachon's acts were allegedly coerced by human, not physical forces. In addition, he did not act to promote the general welfare. Therefore, the necessity defense was not available to him. . . . The district court correctly disallowed his use of the necessity defense.

Contento-Pachon presented credible evidence that he acted under an immediate and well-grounded threat of serious bodily injury, with no opportunity to escape. Because the trier of fact should have been allowed to consider the credibility of the proffered evidence, we reverse . . . and remand.

Dissenting, *Coyle, J.*

The government also contends that the defense of duress includes a fourth element: That a defendant demonstrate that he submitted to proper authorities after attaining a position of safety. This is not an unreasonable requirement and I believe it should be applied. . . . In granting the government's motion . . . excluding the defense of duress, the trial court specifically found Contento-Pachon had failed to present sufficient evidence to establish the necessary elements of immediacy and inescapability. In its Order the district court stated: "The first threat made to defendant and his family about three weeks before the flight was not immediate; the threat was conditioned upon defendant's failure to cooperate in the future and did not place the defendant and his family in immediate danger or harm." The defendant was outside the presence of the drug dealers on numerous occasions for varying lengths of time. There is no evidence that his family was ever directly threatened or even had knowledge of the threats allegedly directed against the defendant.

Moreover, the trial court found that the defendant and his family enjoyed an adequate and reasonable opportunity to avoid or escape the threats of the drug dealers in the weeks before his flight. Until he went to the house where he ingested the balloons containing cocaine, defendant and his family were not physically restrained or prevented from seeking help. The record supports the trial court's findings that the defendant and his family

could have sought assistance from the authorities or have fled. Cases considering the defense of duress have established that where there was a reasonable legal alternative to violating the law, a chance to refuse to do the criminal act and also to avoid the threatened danger, the defense will fail. Duress is permitted as a defense only when a criminal act was committed because there was no other opportunity to avoid the threatened danger. . . .

Questions for Discussion

1. Contrast the views of the majority and dissent on immediacy and escapability.
2. How would you rule?

Cases and Comments

Contento-Pachon *Precedent and Threats to the United States by Foreign Drug Dealers.* Pakistani authorities arrested a drug courier with several kilograms of heroin on his way to New York City. The Pakistanis reported to U.S. Drug Enforcement Agency officials that the courier planned to contact the defendant Subhan. Agents arranged to meet Subhan and arrested him after he took possession of a bag that he believed contained drugs. Subhan claimed that his son had been kidnapped in Pakistan and that the kidnappers had written a note, which Subhan had destroyed, stating that his son would be returned after their "business" with Subhan had been concluded. Various friends and family members supported Subhan's story. Subhan claimed that he had been instructed to pick up the drugs and that he did not approach American authorities because he feared that they would contact the Pakistani police. Subhan presented a report from the U.S. Department of State in his defense documenting that the Pakistani police were corrupt and involved with the drug dealers. He testified that he had reason to believe that the Pakistani authorities would contact the kidnappers, who would kill his son. Subhan relied on the precedent of *Contento-Pachon.* A federal district court ruled that this precedent was inapplicable since Subhan was in the United States at the time of the coercion and could have approached American law enforcement whereas Contento-Pachon was in Columbia, where the authorities were "allegedly corrupt."See *United States v. Subhan,* 38 Fed. App'x 89 (2d Cir. 2002).

You Decide

9.4 Georgia Carradine was held in contempt of court based on her refusal to testify after witnessing a gang-related homicide, explaining that she was in fear for her life and the lives of her children. Carradine was sentenced to six months in the Cook County jail. She persisted in this refusal despite the government's offers to relocate her and her family to other areas in Chicago, Illinois, or the continental United States. Carradine had been separated from her husband for roughly four years and supported her six children aged five to eighteen through payments from her husband and supplemental welfare funds. She explained that she distrusted the State's Attorney and doubted that law enforcement authorities could protect her from the Blackstone Rangers youth gang. Carradine's fear was so great that she was willing to go to jail rather than to testify. The Illinois Supreme Court, in affirming the sentence, stated that criminals could not be brought to the bar of justice "unless citizens stand up to be counted." Do you agree with the decision to deny Carradine the defense of duress? See *State v. Carradine,* 287 N.E.2d 670 (Ill. 1972).

You can find the answer at www.sagepub.com/lippmanccl2e

Mistake of Law and Mistake of Fact

A core principle of the common law is that only "morally blameworthy" individuals should be subject to criminal conviction and punishment. What about the individual who commits an act that he or she does not realize is a crime? Consider a resident of a foreign country who is flying to the United States for a vacation and is asked by a new American acquaintance to bring a vial of expensive heart medicine to his or her parents in the United States. The visitor is searched by American customs officials as he or she enters the United States and the heart medicine is discovered to be an illegal narcotic. Should the victim be held criminally liable for the knowing possession of narcotics despite this "mistake of fact"? What if the visitor was asked by his American friend to transport cocaine and was assured that there was nothing to worry about because the importation and possession of this narcotic is legal in the United States? How should the law

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address this "mistake of law"? We will be addressing these questions throughout the textbook and this section merely provides you with an outline of the central issues.

In the previous two hypothetical examples, the question is whether an individual who mistakenly believes that his or her behavior is legal should be held liable for violating the law. Professor Wayne R. LaFave has observed that no area has created "more confusion" than mistakes of law and fact[52]—a confusion that has caused "ulcers in law students." [53]

Mistake of Law

The conventional wisdom is that ***ignorantia lexis non excusat:*** "Ignorance of the law is no excuse." The rule that a **mistake of law** does not constitute a defense is based on several considerations:[54]

- *Knowledge.* People are expected to know the law.
- *Evidence.* Defendants may falsely claim that they were unaware of the law. This claim would be difficult for the prosecution to overcome.
- *Public Policy.* The enforcement of the law insures social stability.
- *Uniformity.* Individuals should not be permitted to define for themselves the legal rules that govern society.

The expectation that individuals know the law may have made sense in early England. Critics contend, however, that people cannot realistically be expected to comprehend the vast number of laws that characterize modern society. An individual who, through a lack of knowledge, violates highly technical statutes regulating taxation or banking can hardly be viewed as "morally blameworthy."[55] Some observers note that courts seem to have taken this criticism seriously and, in several instances, have relaxed the rule that individuals are presumed to "know the law."[56] Three U.S. Supreme Court decisions illustrate this trend:

- *Notice.* In *Lambert v. California,* the defendant was convicted of failure to adhere to a law that required a "felon" resident in Los Angeles to register with the police within five days. The U.S. Supreme Court found that convicting Lambert would violate due process because the law was unlikely to have come to his attention.[57]
- *Intent.* In *United States v. Cheek,* an airline pilot was counseled by antitax activists and believed that his wages did not constitute income and therefore he did not owe federal tax. He was convicted of willfully attempting to evade or defeat his taxes. The U.S. Supreme Court ruled that Congress required a showing of a willful intent to violate tax laws because the vast number of tax statutes made it likely that the average citizen might innocently fail to remain informed of the provisions of the tax code.[58]
- *Reliance.* In the civil rights–era case of *Cox v. Louisiana,* the defendants were convicted of picketing a courthouse with the intent of interfering, obstructing, or influencing the administration of justice. The U.S. Supreme Court reversed the students' convictions on the grounds that the chief of police had instructed them that they could legally picket at a location 101 feet from the courthouse steps.[59]

The Model Penal Code section 2.04(3) recognizes an "ignorance of the law defense" when the defendant does not know the law and the law has not been published or made reasonably available to the public (notice). This defense also applies where the defendant has relied on an official statement of the law (reliance).

Mistake of Fact

A **mistake of fact** constitutes a defense in those instances when the defendant's mistake results in a lack of criminal intent. The Model Penal Code section 2.04(1) states that "ignorance or mistake is a defense when it negatives the existence of a state of mind that is essential to the commission of an offense. . . ." As a first step, determine the intent required for the offense and then compare this to the defendant's state of mind. A defendant may take an umbrella from a restaurant during a rainstorm believing that this is the umbrella that he or she left at the restaurant two years ago. The accused will be acquitted of theft because he or she lacked the intent to take, carry away, and

permanently deprive the owner of the umbrella. Some courts require that a defendant's mistake must be objectively reasonable, meaning that a reasonable person would have made the same mistake. A trial court, for instance, might conclude that it was unreasonable for the defendant to believe after two years that his umbrella was still at the restaurant.[60]

Another aspect of the mistake of fact defense is that an individual may be mistaken but nonetheless will be held criminally liable in the event that the facts as perceived by the defendant still comprise a crime. For example, a defendant may be charged with receiving stolen umbrellas and contend that he or she believed that the package contained stolen raincoats. This would not exonerate the defendant. The charge is based on the receipt of stolen property, not stolen umbrellas.[61]

Let us return to the issue of whether a mistake of fact must be reasonable. Clearly an honest and good-faith mistake of fact, however misguided, negates a criminal intent. Should the law, however, insist that mistakes meet a reasonableness standard?

In the well-known English case of *Regina v. Morgan,* the appellant Morgan invited his three male co-appellants to have sexual relations with his wife. He led them to believe that Mrs. Morgan would consent to this group activity. Morgan cautioned that Mrs. Morgan was "kinky" and that she may "struggle a bit" in order to enhance her sense of excitement. She was held down while each of the three men engaged in intercourse with her in the presence of the other appellants. The three were convicted of rape. The judge instructed the jury that the defendants must have reasonably believed that despite Mrs. Morgan's resistance, she consented to the rape. The British Law Lords (the equivalent of our U.S. Supreme Court) overturned the convictions and ruled that a male who acts on an unreasonably mistaken belief in the female's consent does not possess the required criminal intent and should be acquitted. Lord Hailsham observed that "either the prosecution proves that the accused had the requisite intent, or it does not." This decision resulted in Parliament enacting a statutory amendment providing that the mistake of fact defense requires an honest and reasonable mistake. Could the appellants in *Morgan* credibly contend that they honestly and reasonably believed that Mrs. Morgan consented? Should we convict individuals who make a factual, but unreasonable mistake, and who lack a criminal intent?[62]

The Model Penal Code section 2.04(1)(a)(b) diverges from the English parliamentary rule and accepts that a mistake of fact constitutes a defense so long as it "negatives" the intent required under the statute. In other words, the Model Penal Code would acquit the defendants in *Morgan* if the jury believed that the defendants did not "purposely, knowingly, or recklessly" rape Mrs. Morgan.

The Legal Equation

Mistake of law	=	No excuse (some indication may excuse criminal liability in cases involving notice, intent, reliance).
Mistake of fact	=	Mistake is an excuse if it negates the required criminal intent (may require reasonable mistake).

You Decide

9.5 The defendant and his cousin, knowing that their marriage would be illegal in Nebraska, married in Iowa, where such unions are not prohibited. The county prosecutor informed the defendant that he would be prosecuted for sexual relations without marriage ("fornication") in the event that the couple continued to live in Nebraska because the marriage was not recognized in the state. Three private attorneys confirmed that the Iowa marriage was not valid in Nebraska. The defendant subsequently "separated" from his pregnant cousin and remarried another woman. It later was determined that, in fact, the Iowa marriage was valid in Nebraska, and the defendant was charged with bigamy (simultaneous marriage to more than a single spouse). Is the defendant guilty of bigamy? See *Staley v. State,* 89 Neb. 701 (1911).

You can find the answer at www.sagepub.com/lippmanccl2e

Entrapment

American common law did not recognize the defense of **entrapment**. The fact that the government entrapped or induced a defendant to commit a crime was irrelevant in evaluating a defendant's guilt or innocence.

The development of the defense is traced to the U.S. Supreme Court's 1932 decision in *Sorrells v. United States*. In *Sorrells,* an undercover agent posing as a "thirsty tourist" struck up a friendship with Sorrells and was able to overcome Sorrells's resistance and persuaded him to locate some illicitly manufactured alcohol. Sorrells's conviction for illegally selling alcohol was reversed by the U.S. Supreme Court.[63]

The decision in *Sorrells* defined entrapment as the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." The essence of entrapment is the government's inducement of an otherwise innocent individual to commit a crime. Decisions have clarified that the prohibition on entrapment extends to the activities of undercover government agents, confidential informants, and private citizens acting under the direction of law enforcement personnel. The defense has been raised in cases involving prostitution; the illegal sale of alcohol, cigarettes, firearms, and narcotics; and public corruption. There is some indication that the defense may not be invoked to excuse a crime of severe violence.

There are good reasons for the government to rely on undercover strategies:

- *Crime Detection*. Certain crimes are difficult to investigate and to prevent without informants. This includes narcotics, prostitution, and public corruption.
- *Resources*. Undercover techniques, such as posing as a buyer of stolen goods, can result in a significant number of arrests without expending substantial resources.
- *Deterrence*. Individuals will be deterred from criminal activity by the threat of government involvement in the crime.

Entrapment is also subject to criticism:

- The government may "manufacture crime" by individuals who otherwise may not engage in such activity.
- The government may lose respect by engaging in lawbreaking.
- The informants who infiltrate criminal organizations may be criminals whose own criminal activity often is overlooked in exchange for their assistance.
- Innocent individuals are often approached in order to test their moral virtue by determining whether they will engage in criminal activity. They likely would not have committed a crime had they not been approached.

The Law of Entrapment

In developing a legal test to regulate entrapment, judges and legislators have attempted to balance the need of law enforcement to rely on undercover techniques against the interest in insuring that innocent individuals are not pressured or tricked into illegal activity. As noted by U.S. Supreme Court Chief Justice Earl Warren in 1958, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[64]

There are two competing legal tests for entrapment that are nicely articulated in the 1958 U.S. Supreme Court case of *Sherman v. United States*. Sherman's conviction on three counts of selling illegal narcotics was overturned by the Supreme Court and the facts, in many respects, illustrate the perils of government undercover tactics. Kalchinian, a government informant facing criminal charges, struck up a friendship with defendant Sherman. They regularly talked during their visits to a doctor who was assisting both of them to end their addiction to narcotics. Kalchinian eventually was able to overcome Sherman's resistance and persuaded him to obtain and to split the cost of illegal narcotics.[65]

The U.S. Supreme Court unanimously agreed that Sherman had been entrapped. Five judges supported a *subjective test* for entrapment and four supported an *objective test*. The federal government and a majority of states follow a subjective test, whereas the Model Penal Code and a minority of states rely on the objective test. Keep in mind that entrapment was developed by judges, and the availability of this defense has not been recognized as part of a defendant's constitutional

right to due process of law. Entrapment in many states is an affirmative defense that results in the burden being placed on the defendant to satisfy a preponderance of the evidence standard. Other states require the defendant to produce some evidence and then place the burden on the government to rebut the defense beyond a reasonable doubt.[66]

The Subjective Test

The subjective test focuses on the defendant and asks whether the accused possessed the criminal intent or "predisposition" to commit the crime or whether the government "created" the offense. In other words, "but for" the actions of the government, would the accused have broken the law? Was the crime the "product of the creative activity of the government" or the result of the defendant's own criminal design?

The first step is to determine whether the government induced the crime. This requires that the undercover agent or informant persuade or pressure the accused. A simple offer to sell or to purchase drugs is a "mere offer" and does not constitute an "inducement." In contrast, an inducement involves appeals to friendship, compassion, promises of extraordinary economic or material gain, sexual favors, or assistance in carrying out the crime.

The second step is the most important and involves evaluating whether the defendant possessed a "predisposition" or readiness to commit the crime with which he or she is charged. The law assumes that a defendant who is predisposed is ready and willing to engage in criminal conduct in the absence of governmental inducements and, for this reason, is not entitled to rely on the defense of entrapment. In other words, the government must direct its undercover strategy against the unwary criminal rather than the unwary innocent. How is predisposition established? A number of factors are considered:[67]

- the character or reputation of the defendant, including prior criminal arrests and convictions for the type of crime involved;
- whether the accused suggested the criminal activity;
- whether the defendant was already engaged in criminal activity for profit;
- whether the defendant was reluctant to commit the offense; and
- the attractiveness of the inducement.

In *Sherman,* the purchase of the drugs was initiated by the informant, Kalchinian, who overcame Sherman's initial resistance and persuaded him to obtain drugs. Kalchinian, in fact, had instigated two previous arrests and was facing sentencing for a drug offense himself. The two split the costs. There is no indication that Sherman was otherwise involved in the drug trade, and a search failed to find drugs in his home. Sherman's nine-year-old sales conviction and five-year-old possession conviction did not indicate that he was ready and willing to sell narcotics. In other words, before Kalchinian induced Sherman to purchase drugs, he seemed to be genuinely motivated to overcome his dependency on narcotics.

The underlying theory is that the jury, in evaluating whether the defendant was entrapped, is merely carrying out the intent of the legislature. The "fiction" is that the legislature did not intend for otherwise innocent individuals to be punished who were induced to commit crimes by government trickery and pressure. The issue of entrapment under the subjective test is to be decided by the jury.

The Objective Test

The objective test focuses on the conduct of the government rather than on the character of the defendant. Justice Felix Frankfurter, in his dissenting opinion in *Sherman,* explained that the crucial question is "whether police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of governmental power." The police, of course, must rely on undercover work, and the test for entrapment is whether the government, by offering inducements, is likely to attract those "ready and willing" to commit crimes "should the occasion arise" or whether the government has relied on tactics and strategies that are likely to attract those who "normally avoid crime and through self-struggle resist ordinary temptations."

The subjective test focuses on the defendant; the objective test focuses on the government's conduct. Under the subjective test, if an informant makes persistent appeals to compassion and friendship and then asks a defendant to sell narcotics, the defendant has no defense if he is predisposed to

selling narcotics. Under the objective test, there would be a defense because the conduct of the police, rather than the predisposition of the defendant, is the central consideration.[68]

Justice Frankfurter wrote that public confidence in the integrity and fairness of the government must be preserved and that government power is "abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law."[69] These unacceptable methods lead to a lack of respect for the law and encourage criminality. Frankfurter argued that judges must condemn corrupt and uncivilized methods of law enforcement even if this judgment may result in the acquittal of the accused. Frankfurter criticized the predisposition test for providing protection for "innocent defendants," while permitting the government to employ various unethical strategies and schemes against defendants who are predisposed.

In *Sherman,* Frankfurter condemned Kalchinian's repeated requests that the accused assist him to obtain drugs. He pointed out that Kalchinian took advantage of Sherman's susceptibility to narcotics and manipulated Sherman's sympathetic response to the pain Kalchinian was allegedly suffering in withdrawing from drugs. The *Sherman* and *Sorrells* cases suggest that practices prohibited under the objective test include:

- taking advantage of weaknesses;
- repeated appeals to friendship, sympathy;
- promising substantial economic gain;
- pressure or threats;
- providing the equipment required for carrying out a crime; and
- false representations designed to induce a belief that the conduct is not prohibited.

Critics complain that the objective test has not resulted in clear and definite standards to guide law enforcement. Can you determine at what point Kalchinian crossed the line? Critics also charge that it makes little sense to acquit a defendant who is "predisposed" based on the fact that a "mythical innocent" individual may have been tricked into criminal activity by the government's tactics. However, the objective test was adopted by the Model Penal Code, which follows Justice Frankfurter in assigning the determination of entrapment to judges rather than juries based on the fact that judges are responsible for safeguarding the integrity of the criminal justice process.

Due Process

Various defendants have unsuccessfully argued that entrapment tactics violate the Due Process Clause of the U.S. Constitution. In other words, the contention is that the government's conduct is so unfair and outrageous that it would be unjust to convict the defendants under the U.S. Constitution.

The U.S. Supreme Court rejected this argument in *United States v. Russell*. Joe Shapiro, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, met with Richard Russell and his co-defendants John and Patrick Connolly. Shapiro offered to provide them with the chemical phenyl-2-propanone, an essential element in the manufacture of methamphetamine, in return for one-half of the drug produced. The three provided Shapiro with a sample of their most recent batch and showed him their laboratory, where Shapiro observed an empty bottle of phenyl-2-propanone. The next day Shapiro delivered one hundred grams of phenyl-2-propanone and watched as two of the defendants begin to manufacture methamphetamine. Shapiro later was given one-half the drug and he purchased a portion of the remainder. A warrant was obtained and a search revealed two bottles of phenyl-2-propanone, neither of which had been provided by Shapiro.

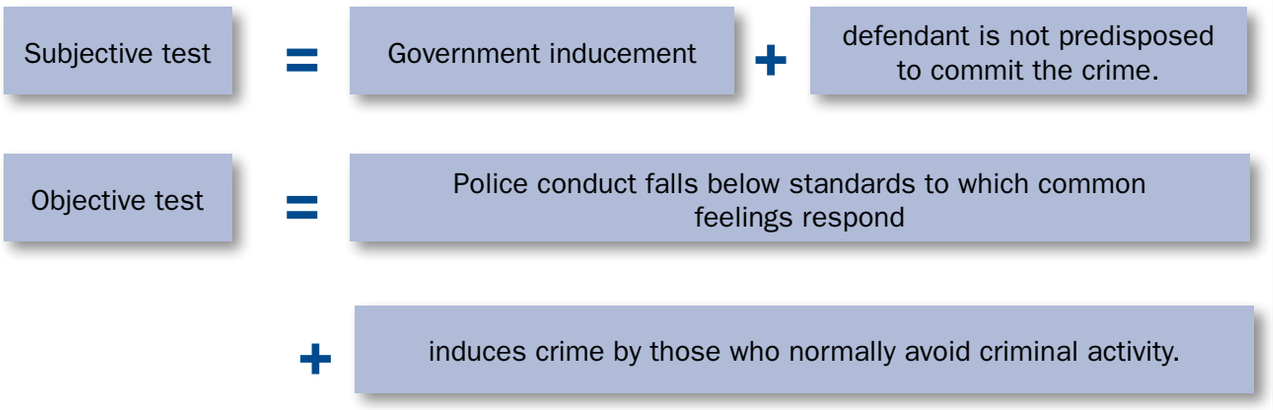
The defendants, although certainly predisposed to manufacture and sell narcotics, creatively claimed that the government violated due process by prosecuting them for a crime in which the government had been intimately involved. The U.S. Supreme Court rejected this argument and stressed that although phenyl-2-propanone was "difficult to obtain, it was by no means impossible" as indicated by the fact that the defendants had been manufacturing "speed" without the phenyl-2-proponone provided by Shapiro. The court concluded that "[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction . . . the instant case is distinctly not of that breed." The Supreme Court stressed that the investigation of drug-related offenses often requires infiltration and cooperation with

narcotics rings and that the law enforcement tactics employed in *Russell* were neither in violation of "fundamental fairness" nor "shocking to the universal sense of justice."[70]

The Entrapment Defense

We might question whether courts should be involved in evaluating law enforcement tactics and in acquitting individuals who are otherwise clearly guilty of criminal conduct. Can innocent individuals really be pressured into criminal activity? Do we want to limit the ability of the police to use the techniques they believe are required to investigate and punish crime? There also appears to be no clear judicial standards for determining predisposition under the subjective test and for evaluating acceptable law enforcement tactics under the objective test. This leaves the police without a great deal of guidance or direction. On the other hand, we clearly are in need of a legal mechanism for preventing government abuse. The next case, *Farley v. State,* raises the issue of whether there should be limits on governmental approaches to criminal investigation.

The Legal Equation



Was Farley entrapped into purchasing child pornography?

Farley v. State, *848 So. 2d 393 (Fla. Dist. Ct. App. 2008), Per Curiam*

Issue

Following the trial court's denial of Michael Farley's ("Farley") motions to dismiss . . . Farley pled "no contest" to three counts of sexual performance by a child. . . . He reserved his right to appeal . . . on the basis of subjective entrapment as a matter of law and substantive due process/objective entrapment.

Facts

Farley's case was precipitated by an unrelated investigation in Texas. In 2000, a husband and wife were arrested in Dallas on child pornography offenses stemming from their sexually oriented Internet business. During the related investigation, a database including a list of names, addresses, e-mail addresses, and credit card information was uncovered. There was no evidence of how or why the list was created and no evidence that anyone appearing on the list ever purchased child pornography from the business. As even the prosecution admitted, the list could have been stolen or purchased, or it could have been entirely innocent.

Texas law enforcement compiled a list of Florida names and addresses from the database and forwarded it to the Broward County Sheriff's Office LEACH Taskforce ("LEACH"). Farley's name, address, e-mail address, credit card number, and other personal information were

included on this list. LEACH cross-checked the names on the list with a list of registered sex offenders and Farley was not listed. LEACH conducted no further inquiry into Farley's background.

LEACH decided to conduct a reverse sting targeting individuals on the list compiled by the Texas authorities. LEACH sent a spam e-mail to every address on the list with an advertisement in excess of 300 words soliciting patrons for a fictitious business, "providers4you.com." The e-mail indicated the business could assist adult customers in obtaining taboo, over-the-edge, extreme, intense, and hard-to-find, sexual material. The e-mail also contained repeated assurances that communications and transactions with the business would be protected from governmental interference.

Farley received the spam e-mail; he had no prior contact with LEACH, had made no request for the e-mail, and only received the e-mail because he was on the list provided by Texas law enforcement. The e-mail suggested that Farley should connect to the business's Web site, which included several Web pages. Some of the assertions made on these pages included that the business does not offer "normal" adult materials, that no request is too bizarre or taboo, and additional assurances of protection from governmental interference. In fact, upon reviewing the Web pages, one can count no fewer than ten instances in which protection from governmental interference is either expressly promised or strongly intimated.

The Web site provided a service for customers to submit information about themselves and their preferences for matching with suppliers. Farley inputted a request for specific pictures of teenage boys. LEACH Detective Bob DeYoung ("DeYoung") received Farley's request and sent a reply e-mail indicating the request had been forwarded to supplier Stephen Hall ("Hall"), DeYoung's fictitious alter ego. Hall then sent Farley an e-mail requesting more specific details regarding Farley's preferences.

An escalating e-mail exchange ensued between Farley and Hall. Farley provided more details about his preferences in two e-mails. Hall asked Farley to respond with even more specificity. Farley provided more information. Only after this inquisition, in which Farley was asked to provide increasingly explicit details about his desires, was he e-mailed an order form. The form listed products featuring underage boys, all of which were invented by Hall/DeYoung.

Farley ordered three VHS cassettes to be paid C.O.D. DeYoung and LEACH arranged for a controlled delivery of the order to Farley's residence. LEACH prepared three VHS cassettes by dubbing previously seized materials and labeling the tapes with the titles requested by Farley. A postal inspector acting as a letter carrier delivered the tapes to Farley. Farley accepted the tapes and paid cash. Twenty minutes later, he was arrested.

Reasoning

With these facts in mind, we turn to Farley's assertion that the trial court erred in denying his motion to dismiss on the basis of subjective entrapment as a matter of law, and substantive due process/objective entrapment. The defense of subjective entrapment is statutorily defined in Florida. See Florida Statutes section 777.201 (2002). The test for subjective entrapment in Florida was developed in *Munoz v. State,* 629 So. 2d 90 (Fla. 1993). Three questions must be answered under the test to establish a subjective entrapment defense: (1) whether a government agent induced the defendant to commit the crime charged; (2) whether the defendant was predisposed to commit the crime charged; and (3) whether the entrapment defense should be evaluated by the jury.

Turning to the first question, inducement is defined as:

Any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.

In *Beattie v. State,* 636 So. 2d 744 (Fla. Dist. Ct. App. 1993), inducement was found based on events stemming from a newspaper advertisement. U.S. Customs placed an advertisement for materials featuring "miniature & young love" in a free newspaper. Beattie responded to the advertisement and expressed interest in some movies. An exchange of ten letters ensued, only after which did Customs arrange a meeting with Beattie to sell him a pornographic video.

In the present case, Farley was subjected to various acts of inducement by LEACH. The assurances of protection from government scrutiny could certainly be labeled fraudulent representations when made by government. The similarities to *Beattie* are striking. Farley was also confronted with an advertisement disseminated by the government, except he, unlike Beattie, was not willingly exposed to the advertisement. Farley indicated interest in the products offered by visiting a Web site and declaring his preferences, and like Beattie, he was then confronted with an exchange of correspondence. Only after that exchange was Farley offered an order form, leading to his purchase and arrest.

The State maintains that this type of law enforcement conduct does not demonstrate the necessary progression from "innocent lure" to "frank offer" required for inducement and entrapment. However, the facts in Farley's case clearly refute this assertion. The progression began with a spam e-mail and escalated to the point where lurid personal details were elicited in eventual exchange for an order form. What began as a plan to possibly uncover an offender from the Texas list, became a concerted effort to lure Farley into committing a crime. Therefore, inducement is present in Farley's case, and the *Munoz* analysis may proceed to its second phase.

Addressing the second question, predisposition is defined as:

Whether the accused was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense.

Predisposition has been found to be absent where the defendant was not known for deviant behavior prior to

the brush with law enforcement at issue. Predisposition is also not present when one has no prior criminal history related to the offense at issue.

In the present case, there is no evidence that Farley was predisposed to possess child pornography. No evidence was adduced that Farley had ever purchased such pornography nor were any other pornographic materials found in his home. Additionally, Farley had never been arrested for anything in his life, let alone a child pornography offense.

The State contends the fact that Farley ordered the videos indicates that he had a predisposition to possess child pornography. However, this view overlooks even the common connotation of the word "predisposition." The prefix "pre-" indicates that the disposition must exist before first contact with the government. In the present case, prior to receiving the spam e-mail from the government, there is no indication that Farley had any inclination to purchase and possess child pornography. Therefore, Farley was not predisposed to commit the crime and the *Munoz* analysis may proceed to its final stage.

When confronting the third question, we again turn to *Beattie* for instruction. Beattie satisfied his burden by establishing inducement and also establishing his lack of predisposition. The State was unable to present rebuttal evidence of predisposition, so it did not carry its burden on this element. Because the facts and law at hand clearly established entrapment rather than crime, the court held it was error to deny Beattie's motion to dismiss. In doing so, the court found it unnecessary to answer the final question of the Munoz test; however, in essence, the court concluded that as a matter of law, entrapment existed, and therefore the jury had nothing to consider.

Holding

In Farley's case, inducement and lack of predisposition were clear upon the face of the facts. The State presented no evidence of past deviant behavior or criminal activity on Farley's part. Therefore, entrapment rather than crime was at hand, and as a matter of law, the trial court should have granted Farley's motion to dismiss. After all: "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."

Reasoning

We now turn to the second issue to be discussed in this opinion, substantive due process/objective entrapment. The test for objective entrapment was eliminated by Florida's shift to statutory subjective entrapment, but the courts may still review entrapment objectively under the due process clause of the Florida Constitution. Farley contends that LEACH engaged in and propagated an illegal industry and targeted its efforts at Farley without any evidence of his prior involvement or interest in child pornography in violation of his due process rights.

There are several examples of law enforcement conduct that rises to the level of offending due process. In *State v. Williams,* 623 So. 2d 462 (Fla. 1993), the Florida Supreme Court held that law enforcement manufacture of crack cocaine for use in a reverse sting operation near a school violated due process. The court found this conduct to be outrageous, partially because crack cocaine is addictive and deadly. Additionally, in *Glosson v. State,* 462 So. 2d 1082 (Fla. 1985), the court found a contingent fee arrangement for the testimony of an informant a violation of due process, because it "seemed to manufacture, rather than detect, crime."

Law enforcement conduct in Farley's case is very similar to that in the cited cases. LEACH manufactured copies of videos featuring child pornography. Although child pornography may not be deadly like crack cocaine, child pornography may encourage and memorialize traumatic sex crimes. Additionally, Farley was not involved in an existing criminal undertaking in need of detection by law enforcement; rather, LEACH sought to manufacture crime based on a list of names and addresses of unknown origin.

The State maintains that . . . law enforcement conduct in Farley's case simply does not rise to the level of offending due process. The State points out that the "conduct of the government must be outrageous and prejudicial to the ability of a defendant to receive a fair trial." However, Florida courts have repeatedly found that cases stemming from manufactured crime similar to that present in Farley's case do achieve the requisite level of outrageousness. For example, this Court wrote the following in the case of a loan-sharking sting: "Where the government supplies all of the instrumentalities of a crime, controls all of its aspects, and teaches the intended target how to commit the crime for purposes of arresting him, as the trial court found here, there is no crime at all without government involvement. No legitimate objective of government is accomplished by prosecuting a crime so totally and completely orchestrated by the government. We conclude that this activity violates due process."

What cements Farley's case as one that violates due process is not only the manufacture of crime, but the fact that such crime was manufactured under cover of a promise of protection from government interference. Thus, we conclude that the trial court erred by denying his motion to dismiss based on substantive due process/objective entrapment.

Holding

In conclusion, Farley established defenses of subjective entrapment as a matter of law and substantive due process/objective entrapment, and therefore, the trial court erred in denying Farley's motion to dismiss. As a result, we reverse Farley's conviction and sentence and remand for further proceedings consistent with this opinion.

Questions for Discussion

1. Outline the facts leading to Farley's arrest.
2. What is the legal test for subjective entrapment in Florida? Why did the Florida appellate court conclude that there was inducement? Why did the court conclude that Farley was not predisposed to purchase child pornography? Do you agree with the appellate court's analysis?
3. In light of the appellate court's analysis, did the trial court judge make an error when he submitted Farley's case to the jury?
4. What are the most important facts recited by the appellate court to support the conclusion that the government violated the due process/objective test? Do you agree with the decision of the appellate court?
5. Was the investigation and prosecution of Farley a wise use of governmental resources?

See more cases on the study site; People v. Bonner, *www.sagepub.com/lippmanccl2e*

New Defenses

The criminal law is based on the notion that individuals are responsible and accountable for their decisions and subject to punishment for choosing to engage in morally blameworthy behavior. We have reviewed a number of circumstances in which the law has traditionally recognized that individuals should be excused and should not be held fully responsible. In the last decades, medicine and the social sciences have expanded our understanding of the various factors that influence human behavior. This has resulted in defendants offering various new defenses that do not easily fit into existing categories. These defenses are not firmly established and have yet to be accepted by judges and juries. Most legal commentators dismiss the defenses as "quackery" or "science" and condemn these initiatives for undermining the principle that individuals are responsible for their actions.

One of the foremost critics is Professor Allan Dershowitz of Harvard Law School, who has pointed to fifty "abuse excuses." Dershowitz defines an **abuse excuse** as a legal defense in which defendants claim that the crimes with which they are charged result from their own victimization and that they should not be held responsible. An example is the "battered wife" and "battered child syndromes" (discussed in Chapter 8).[71] A related set of defenses are based on the claim that the defendant's biological or genetic heredity caused him or her to commit a crime. George Fletcher has warned that these types of defenses could potentially undermine the assumption that all individuals are equal and should be rewarded or punished based on what they do, not on who they are. On the other hand, proponents of these new defenses argue that the law should evolve to reflect new intellectual insights.[72]

Some New Defenses

Four examples of *biological defenses* are:

- *XYY Chromosome.* This is based on research that indicates that a large percentage of male prison inmates possess an extra Y chromosome that results in enhanced "maleness." (Each fetus has two sex chromosomes, one of which is an X. A female has two X chromosomes; a male a Y and an X chromosome.) A Maryland appeals court dismissed a defendant's claim that his robbery should be excused based on the presence of an extra Y masculine chromosome that allegedly made it impossible for him to control his antisocial and aggressive behavior.[73]
- *Premenstrual Syndrome (PMS).* Many women experience cramps, nausea, and discomfort prior to menstruation. PMS has been invoked by defendants who contend that they suffered from severe pain and distress that drove them to act in a violent fashion. Geraldine Richter was detained by an officer for driving while intoxicated, and she verbally attacked and threatened the officer and kicked the breathalyzer. A Fairfax County, Virginia, judge acquitted Richter of driving while intoxicated and resisting arrest and other charges after an expert testified that her premenstrual condition caused her to absorb alcohol at an abnormally rapid rate.[74]

- *Postpartum Psychosis*. This is caused by a drop in the hormonal level following the birth of a child. The result can be depression, suicide, and in its extreme manifestations delusions, hallucinations, and violence. Stephanie Molina reportedly was a happy and outgoing young woman who suffered severe depression and a paranoid fear of being killed. She subsequently killed her child, attempted suicide, and made an effort to burn her house down. A California appellate court ruled that the jury should have been permitted to consider evidence of Molina's condition in evaluating her guilt for the intentional killing of her child.[75]
- *Environmental Defense*. The Massachusetts Supreme Judicial Court rejected a defendant's effort to excuse a homicide based on the argument that the chemicals he used in lawn care work resulted in involuntary intoxication and led him to violently respond to a customer's complaint.[76]

Brainwashing is an example of a *psychological defense* in which an individual claims to have been placed under the mental control of others and to have lost the capacity to make independent decisions. A well-known example is newspaper heiress Patricia Hearst who, in 1974, was kidnapped by a small terrorist group, the Symbionese Liberation Army (SLA). Several months later, she entered a bank armed with a machine gun and assisted the group in a robbery. Patricia Hearst testified at trial that she had been abused and brainwashed by the SLA and had been programmed to assume the identity of "Tanya the terrorist." The jury dismissed this claim and convicted Patty Hearst.[77] Another example of a psychological defense is *post-traumatic stress disorder.* A Tennessee Court of Appeals ruled that a veteran of the Desert Shield and Desert Storm military campaigns who recently had returned to the United States should be permitted to introduce evidence demonstrating that his wartime experiences led him to react in an emotional and violent fashion to his wife's romantic involvement with the victim.[78]

Defendants relying on *sociological defenses* claim that their life experiences and environment have caused them to commit crimes. These include:

- *Black Rage*. Colin Ferguson, a thirty-five-year-old native of Jamaica, in December 1993, boarded a commuter train in New York City and embarked on a shooting spree against Caucasian and Asian passengers that left six dead and nineteen wounded. The police found notes in which Ferguson expressed a hatred for these groups as well as for "Uncle Tom Negroes." His lawyer announced that Ferguson would offer the defense of extreme racial stress precipitated by the destructive racial treatment of African Americans. Ferguson ultimately represented himself at trial and did not raise this defense, which nonetheless has been the topic of substantial discussion and debate.[79]
- *Urban Survivor.* Daimon Osby, a seventeen-year-old student, shot and killed two unarmed cousins who had been demanding that Osby provide them with the opportunity to win back the money they had lost to him while gambling. At one point, a white pickup apparently belonging to one of the cousins pulled alongside Osby's automobile and a rifle barrel was allegedly pointed out the window. Two weeks later, the same truck approached and Osby shot and killed the occupants, Marcus and Willie Brooks, neither of whom were armed. The defense offered the "urban survivor defense" during Osby's first trial. This resulted in a hung jury. He then was retried and convicted. The defense unsuccessfully appealed the fact that Osby was prohibited from introducing experts supporting his claim of the "urban survivor syndrome" at the second trial. The "urban survivor defense" consists of the contention that young people living in poor and violent urban areas do not receive adequate police protection and develop a heightened awareness and fear of threats.[80]
- *Media Intoxication.* Defendants have claimed that their criminal conduct is caused by "intoxication" from television and pornography. Ronald Ray Howard, nineteen, unsuccessfully argued in mitigation of a death sentence that he had killed a police officer while listening to "gangsta rap."[81]
- *Rotten Social Background*. In *United States v. Alexander,* the defendant shot and killed a white Marine who had uttered a racial epithet. The African American defendant claimed that he had shot as a result of an irresistible impulse that resulted from his socially deprived childhood. Alexander's early years were marked by abandonment, poverty, discrimination, and an absence of love. This "rotten social background" (RSB) allegedly created an irresistible impulse to kill in response to the Marine's remark. The District of Columbia Court of

Appeals affirmed the trial judge's refusal to issue a jury instruction on RSB. Judge David Bazelon dissented and questioned whether society had a right to sit in judgment over a defendant who had been so thoroughly mistreated.[82]

The Cultural Defense

Defendants in several cases have invoked the "cultural defense." This involves arguing that a foreign-born defendant was following his or her culture and was understandably unaware of the requirements of American law. Those in favor of the "cultural defense" argue that it is unrealistic to expect that new immigrants will immediately know or accept American practices in areas as important as the raising and disciplining of children.

The acceptance of diversity, however, may breed a lack of respect for the law among immigrant groups and lead Americans who are required to conform to legal standards to believe that they are being treated unfairly. Judges and juries may also lack the background to determine the authentic customs and traditions of various immigrant groups and may be forced to rely on expert witnesses to understand different cultures.

Multiculturalism may be in conflict with important American values regarding respect for women and children. Various Laotian American tribal groups continue the practice of "marriage by capture," in which a prospective bride is expected to protest sexual advances and the male is required to compel the woman to submit in order to establish his courage and ability to be a strong and suitable husband. In one California case, a young woman who did not accept her parents' Hmong cultural practice alleged that she had been raped by her new husband, who invoked a cultural defense.[83]

The next case in the textbook is *State v. Kargar.* The defendant is originally from Afghanistan and argues that the Maine Supreme Judicial Court should invoke an unusual statute that authorizes courts to dismiss charges against defendants whose acts, although technically in violation of the law, result in minimal social harm.

Should the defendant be excused of gross sexual assault based on the practice of the Afghan culture?

State v. Kargar, *679 A.2D 81 (ME. 1996),* Opinion by: Dana, J.

Facts

Mohammad Kargar, an Afghani refugee, appeals from the judgments entered in the Superior Court (Cumberland County) convicting him of two counts of gross sexual assault. Kargar contends on appeal that the court erred in denying his motion to dismiss pursuant to the de minimis statute, Maine Revised Statutes Annotated title 17-A, section 12 (1983). We agree and vacate the judgments. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and . . . the other person, not the actor's spouse, has not in fact attained the age of fourteen years.

On June 25, 1993, Kargar and his family, refugees since approximately 1990, were babysitting a young neighbor. While the neighbor was there, she witnessed Kargar kissing his eighteen-month-old son's penis. When she was picked up by her mother, the girl told her mother what she had seen. The mother had previously seen a picture of Kargar kissing his son's penis in the Kargar family photo album. After her daughter told her what she had seen, the mother notified the police.

Peter Wentworth, a sergeant with the Portland Police Department, went to Kargar's apartment to execute a search warrant. Wentworth was accompanied by two detectives, two Department of Human Services social workers, and an interpreter. Kargar's family was taken outside by the social workers and the two detectives began searching for a picture or pictures of oral/genital contact. The picture of Kargar kissing his son's penis was found in the photograph album. Kargar admitted that it was he in the photograph and that he was kissing his son's penis. Kargar told Wentworth that kissing a young son's penis is accepted as common practice in his culture. Kargar also said it was very possible that his neighbor had seen him kissing his son's penis. Kargar was arrested and taken to the police station.

Prior to the jury-waived trial Kargar moved for a dismissal of the case pursuant to the de minimis statute. . . . The de minimis hearing consisted of testimony

from many Afghani people who were familiar with the Afghani practice and custom of kissing a young son on all parts of his body. Kargar's witnesses, all relatively recent emigrants from Afghanistan, testified that kissing a son's penis is common in Afghanistan, that it is done to show love for the child, and that it is the same whether the penis is kissed or entirely put into the mouth because there are no sexual feelings involved. The witnesses also testified that pursuant to Islamic law any sexual activity between an adult and a child results in the death penalty for the adult. Kargar also submitted statements from expert witnesses that support the testimony of the live witnesses. The State did not present any witnesses during the de minimis hearing. Following the presentation of witnesses the court denied Kargar's motion and found him guilty of two counts of gross sexual assault.

Kargar testified during the de minimis hearing that the practice was acceptable until the child was three, four, or five years old. He also testified during the de minimis hearing that his culture views the penis of a child as not the holiest or cleanest part of the body because it is from where the child urinates. Kargar testified that kissing his son there shows how much he loves his child precisely because it is not the holiest or cleanest part of the body.

Issue

Maine's de minimis statute, Maine Revised Statutes Annotated title 17-A, section 12, provides, in pertinent part:

1. The court may dismiss a prosecution if, . . . having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:
   A. Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the crime; or
   B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or
   C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.

The court analyzed Kargar's conduct, as it should have, pursuant to each of the three provisions of section 12(1). The language of the statute itself makes it clear that if a defendant's conduct falls within any one of these provisions, the court may dismiss the prosecution. We agree with the State that trial courts should be given broad discretion in determining the propriety of a de minimis motion. In the instant case, however, Kargar asserts that the court erred as a matter of law because it found culture, lack of harm, and his innocent state of mind irrelevant to its de minimis analysis. We agree.

Reasoning

Maine's de minimis statute's . . . purpose is to "introduce a desirable degree of flexibility in the administration of the law." The language of the statute expressly requires that courts view the defendant's conduct "having regard to the nature of the conduct alleged and the nature of the attendant circumstances." Each de minimis analysis will therefore always be case-specific. The Model Penal Code traces the history of de minimis statutes . . . [and] suggests that courts should have the "power to discharge without conviction, persons who have committed acts which, though amounting in law to crimes, do not under the circumstances involve any moral turpitude."

When making a determination under the de minimis statute, an objective consideration of surrounding circumstances is authorized. . . . Although we have not had occasion to articulate circumstances worthy of cognizance, we agree with the courts of New Jersey and Hawaii that the following factors are appropriate for de minimis analysis: the background, experience, and character of the defendant, which may indicate whether he knew or ought to have known of the illegality; the knowledge of the defendant of the consequences to be incurred upon violation of the statute; the circumstances concerning the offense; the resulting harm or evil, if any, caused or threatened by the infraction; the probable impact of the violation upon the community; the seriousness of the infraction in terms of punishment, bearing in mind that punishment can be suspended; mitigating circumstances as to the offender; possible improper motives of the complainant or prosecutor; and any other data that may reveal the nature and degree of the culpability in the offense committed by the defendant. . . . We thus hold that it is appropriate for courts to analyze a de minimis motion by reviewing the full range of factors discussed in the above quoted language.

Our review of the record in the instant case reveals that the court . . . denied Kargar's motion without considering the full range of relevant factors. The court's interpretation of the subsection, which focused on whether the conduct met the definition of the gross sexual assault statute, operated to nullify the effect of the de minimis analysis called for by the statute. The focus is not on whether the conduct falls within the reach of the statute criminalizing it. If it did not, there would be no need to perform a de minimis analysis. The focus is not on whether the admittedly criminal conduct was envisioned by the Legislature when it defined the crime. If the Legislature did not intend that there be an individual, case-specific analysis then there would be no point to the de minimis statute. Subsection 1(C) provides a safety valve for circumstances that could not have been envisioned by the Legislature. It is meant to be applied

on a case-by-case basis to unanticipated "extenuations," when application of the criminal code would lead to an "ordered but intolerable" result. Because the Legislature did in fact allow for unanticipated "extenuations," the trial court was required to consider the possibility that . . . a conviction in this case could not have been anticipated by the Legislature when it defined the crime of gross sexual assault.

In order to determine whether this defendant's conduct was anticipated by the Legislature when it defined the crime of gross sexual assault, it is instructive to review the not-so-distant history of that crime. Maine Revised Statutes Annotated title 17-A, section 253(1)(B), makes criminal any sexual act with a minor (non-spouse) under the age of fourteen. A sexual act is defined as, among other things, "direct physical contact between the genitals of one and the mouth . . . of the other." Prior to 1985 the definition of this type of sexual act included a sexual gratification element. The Legislature removed the sexual gratification element because, "given the physical contacts described, no concern exists for excluding 'innocent' contacts." . . . Thus, the 1985 amendment to section 251(1)(C) illuminates the fact that an "innocent" touching such as occurred in this case has not forever been recognized as inherently criminal by our own law. The Legislature's inability to comprehend "innocent" genital-mouth contact is highlighted by reference to another type of "sexual act," namely, "any act involving direct physical contact between the genitals . . . of one and an instrument or device manipulated by another." Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(C)(3). The Legislature maintained the requirement that for this type of act to be criminal it must be done for the purpose of either sexual gratification or to cause bodily injury or offensive physical contact. Its stated reason for doing so was that "a legitimate concern exists for excluding 'innocent' contacts, such as for proper medical purposes or other valid reasons." . . .

All of the evidence presented at the de minimis hearing supports the conclusion that there was nothing "sexual" about Kargar's conduct. There is no real dispute that what Kargar did is accepted practice in his culture. The testimony of every witness at the de minimis hearing confirmed that kissing a young son on every part of his body is considered a sign only of love and affection for the child. This is true whether the parent kisses, or as the trial court found, "engulfs" a son's penis. There is nothing sexual about this practice. In fact, the trial justice expressly recognized that if the State were required to prove a purpose of sexual gratification it "wouldn't have been able to have done so."

During its sentencing of Kargar, the court stated: "There is no sexual gratification. There is no victim impact." The court additionally recognized that the conduct for which Kargar was convicted occurred in the open, with his wife present, and noted that the photograph was displayed in the family photo album, available for all to see. The court concluded its sentencing by recognizing that this case is "not at all typical [but instead is] fully the exception. . . . The conduct was unequivocally criminal, but the circumstances of that conduct and the circumstances of this defendant call for leniency." Although the court responded to this call for leniency by imposing an entirely suspended sentence, the two convictions expose Kargar to severe consequences independent of any period of incarceration, including his required registration as a sex offender . . . and the possibility of deportation. . . . These additional consequences emphasize why the factors recognized by the court during the sentencing hearing were also relevant to the de minimis analysis. Kargar's wife, Shamayel, testified during the sentencing hearing that she took the picture to send to Kargar's mother to show her how much he loved his son.

Holding

Although it may be difficult for us as a society to separate Kargar's conduct from our notions of sexual abuse, that difficulty should not result in a felony conviction in this case. The State concedes that dismissing this case pursuant to the de minimis statute would pose little harm to the community. The State is concerned, however, with the potential harm caused by courts using the factors of this case to allow for even more exceptions to the criminal statutes. It argues that exceptions should be made by the Legislature, which can gather data, debate social costs and benefits, and clearly define what conduct constitutes criminal activity. The flaw in the State's position is that the Legislature has already clearly defined what conduct constitutes gross sexual assault. It has also allowed for the adjustment of the criminal statutes by courts in extraordinary cases where, for instance, the conduct cannot reasonably be regarded as envisaged by the Legislature in defining the crime.

As discussed above, the Legislature removed the sexual gratification element previously contained within the definition of a sexual act because it could not envision any possible innocent contacts, "given the physical contacts described." In virtually every case the assumption that a physical touching of the mouth of an adult with the genitals of a child under the age of fourteen is inherently harmful is correct. This case, however, is the exception that proves the rule. Precisely because the Legislature did not envision the extenuating circumstances present in this case, to avoid an injustice the de minimis analysis set forth in section 12(1)(C) requires that Kargar's convictions be vacated.

Application of the de minimis statute does not . . . reflect approval of Kargar's conduct. The conduct remains criminal. Kargar does not argue that he should now be permitted to practice that which is accepted in his culture. The issue is whether his past conduct under all of the circumstances justifies criminal convictions.

Questions for Discussion

1. Are you persuaded that Kargar's conduct was a central part of his culture? Did he realize that his conduct was criminal? Should Kargar's cultural background dictate the court's decision?
2. Might Kargar's son suffer long-term harm? Does the court overlook the issue of the victim's incapacity to consent and need for protection? At what age would the Maine court rule that Kargar's conduct toward his son was in violation of the law? Would the Maine Supreme Judicial Court have dismissed Kargar's conviction if his behavior involved acts considered more sexually intrusive?
3. Do you believe that the Maine court would have reached the same decision if Kargar had been born and raised in the United States? If the "victim" had been a female?
4. What if Kargar continues to engage in this conduct? Will the Maine court reach the same decision in the event that another Afghan immigrant engages in similar conduct?
5. Should the cultural concern be raised at sentencing rather than when considering guilt or innocence? Was the Maine court influenced by the threat that Kargar would be required to register as a sexual offender and risk deportation?

You Decide

9.6 A Laotian refugee was indicted for the intentional killing of his wife of one month. The defendant offered the defense that his wife's continuing affection and receipt of phone calls from a former boyfriend brought shame on the defendant and his family and caused him to lose self-control. Should this cultural consideration result in the defendant being held liable for voluntary manslaughter? See *People v. Aphaylath,* 502 N.E.2d 998 (N.Y. 1986).

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

Excuses comprise a broad set of defenses in which defendants claim a lack of responsibility for their criminal acts. This lack of "moral blameworthiness" is based on a lack of criminal intent or on the involuntary nature of the defendant's criminal act.

The M'Naghten "right-wrong" formula is the predominant test for *legal insanity.* The criminal justice system has experimented with broader approaches that resulted in a larger number of defendants being considered legally insane.

- *Irresistible Impulse.* Emotions cause loss of control to conform behavior to the law.
- *Durham Product Test.* The criminal act was the product of a mental disease or defect.
- *Substantial Capacity.* The defendant lacks substantial (not total) capacity to distinguish right from wrong or to conform his or her behavior to the law.

The diminished capacity defense permits defendants to introduce evidence of mental defect or disease to negate a required criminal intent. This typically is limited to murder. Other excuses include:

- *Duress.* A defendant is excused who commits a crime under a reasonable belief that he or she is threatened with imminent and unavoidable serious bodily harm. Duress does not excuse homicide.
- *Infancy.* The common law and various state statutes divide age into three distinct periods. Infancy is an excuse (younger than seven at common law). There is a rebuttable presumption that adolescents in the middle period lack the capacity to form a criminal intent (between seven and fourteen at common law). Individuals older than fourteen are considered to have the same capacity as adults.
- *Intoxication.* Voluntary intoxication is recognized as a defense to a criminal charge requiring a specific intent. The trend is for abolition of the excuse of voluntary intoxication. Involuntary intoxication is a defense where, as a result of alcohol or drugs, the individual meets the standard for legal insanity in the jurisdiction.
- *Mistake.* A mistake of law is never a defense; a mistake of fact may be relied on to demonstrate a lack of a specific criminal intent. Some courts require that the mistake of fact is reasonable.

- *Entrapment.* Entrapment asks whether the government "implanted a criminal intent" in an otherwise innocent individual. The subjective approach to entrapment focuses on the defendant. This requires that the government induce an individual who lacks a criminal predisposition to commit a crime. The objective test centers on the government. This asks whether the government's conduct falls below accepted standards and would have induced an otherwise innocent individual to engage in criminal conduct. Courts have been reluctant to find that the Due Process Clause protects individuals against outrageous governmental misconduct.

The new defenses surveyed illustrate the effort to base excuses on new developments in biology, psychology, and sociology. Critics contend that many of these are "abuse excuses," in which defendants manipulate the law by claiming that they are victims. On the other hand, defendants ask why some traits and conditions are considered to excuse criminal activity while factors such as poverty, inequality, or abuse are not recognized as a defense. The general trend is for the law to limit rather than to expand criminal excuses.

Chapter Review Questions

1. Define and distinguish between the four major legal approaches to legal insanity.
2. Discuss the purpose of the diminished capacity defense. What is the result of the application of the defense to a defendant charged with a crime requiring a specific intent?
3. Distinguish between the defenses of voluntary and involuntary intoxication.
4. Describe the common law defense of infancy. How has this been modified under contemporary statutes?
5. What are the elements of the duress defense?
6. Discuss the difference between the mistake of law and mistake of fact defenses.
7. What are the two tests of entrapment? How do these two tests differ from one another? Explain the relationship between these two tests for entrapment and the due process approach.
8. Provide some examples of the "new defenses." How do these differ from established criminal law defenses? Do you agree that some of these defenses deserve to be criticized as "abuse excuses"?
9. Outline the debate over the insanity defense and various efforts at reform. Would you favor abolishing the insanity defense?
10. Under what conditions should defendants younger than eighteen be prosecuted as "adult offenders"?
11. Write a brief essay summarizing the law of excuses and stress their common characteristics.

Legal Terminology

abuse excuse
civil commitment
competence to stand trial
diminished capacity
duress
Durham product test
entrapment
excuses
guilty but mentally ill (GBMI)
ignorantia lexis non excusat
infancy
insanity defense
involuntary intoxication
irresistible impulse test
mistake of fact
mistake of law
M'Naghten test
substantial capacity test
voluntary intoxication

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read about the trial of Ralph Tortorici on the Public Broadcasting Web site. Was he entitled to the defense of insanity?
2. Read about the insanity defense and the John Hinckley case.
3. Amnesty International has criticized the life imprisonment without parole of juveniles convicted of serious criminal offenses such as murder. Do you support the life imprisonment of juvenile offenders?

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Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), pp. 317–342. A good review of the literature calling for an abolition of excuses.

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10 Criminal Sexual Conduct, Assault and Battery, Kidnapping, and False Imprisonment

Was C.G. raped by the defendant?

C.G. stated that earlier in the day, M.T.S. had told her three or four times that he "was going to make a surprise visit up in [her] bedroom." She said that she had not taken M.T.S. seriously and considered his comments a joke because he frequently teased her. She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hands inside of her pants, but that she had rejected all of his previous advances. C.G. testified that on May 22, at approximately 1:30 A.M., she awoke to use the bathroom. As she was getting out of bed, she said, she saw M.T.S., fully clothed, standing in her doorway. According to C.G., M.T.S. then said that "he was going to tease [her] a little bit." C.G. testified that she "didn't think anything of it"; she walked past him, used the bathroom, and then returned to bed, falling into a "heavy" sleep within fifteen minutes. The next event C.G. claimed to recall of that morning was waking up with M.T.S. on top of her, her underpants and shorts removed. She said "his penis was into [her] vagina." As soon as C.G. realized what had happened, she said, she immediately slapped M.T.S. once in the face, then "told him to get off [her], and get out." She did not scream or cry out. She testified that M.T.S. complied in less than one minute after being struck; according to C.G., "he jumped right off of [her]." She said she did not know how long M.T.S. had been inside of her before she awoke. C.G. said that after M.T.S. left the room, she "fell asleep crying" because "[she] couldn't believe that he did what he did to [her]." She explained that she did not immediately tell her mother or anyone else in the house of the events of that morning because she was "scared and in shock."

Core Concepts and Summary Statements

Introduction

There are four categories of crimes against the person: homicide, sexual offenses, crimes against bodily integrity, and offenses against personal liberty and freedom.

Rape

A. The law of rape was originally viewed as protecting a male's property rights to a female. Today it punishes the violation of a victim's bodily and psychological integrity.
B. The law has particular difficulty in addressing "date rape" because it is often difficult to determine whose version of the facts to believe.
C. The common law defined rape as the forcible carnal knowledge of a woman against her will. The fear of false convictions led to strict requirements for the establishment of rape.
D. Rape reform abolished most of these requirements and established rape as a gender-neutral offense that can be committed within marriage. The most important change was to shift the emphasis from resistance by the victim to the conduct of the defendant. There are two different tests for the employment of force by the defendant, extrinsic and intrinsic.
E. The force requirement may be satisfied by the threat or use of force or by fraud concerning the nature of the act.
F. Statutory rape is a strict liability offense that makes it a felony to engage in intercourse with an underage individual.
G. An individual may withdraw consent in the midst of sexual interaction. In the event that the other party disregards this withdrawal of consent, he or she would be guilty of rape.
H. Rape shield laws prohibit the introduction of evidence concerning a victim's prior sexual activity or reputation for chastity.

Assault and Battery

Battery involves bodily injury or offensive touching. An assault is an unsuccessful battery or the placing of an individual in fear of an imminent battery.

Kidnapping

Kidnapping is the unlawful and nonconsensual abduction of an individual.

False Imprisonment

False imprisonment is the unlawful and nonconsensual restraint of an individual.

Introduction

This chapter discusses three categories of crimes against the person. The first is freedom from sexual violations (rape and sexual assault), and the second is protection against the threat and infliction of bodily harm (assault and battery). A third category is freedom of movement (kidnapping and false imprisonment). In the next chapter we will cover the law of homicide, which protects an individual's interest in life.

Next to homicide, sexual offenses are considered the most serious offenses against the person and are punished as felonies, even when the victim is not physically injured. This harsh punishment reflects the fact that nonconsensual acts of sexual intimacy can cause severe physical injury as well as psychological trauma. Assaults and batteries and false imprisonment are typically misdemeanors (other than when committed in an aggravated fashion) that risks or results in physical injury. Kidnapping is considered a serious offense that places people in danger and was subject to the death penalty under the common law.

There clearly is no more fundamental or important interest than protecting the life and bodily integrity of the individual. This is the basic and essential expectation of all members of a community. Imagine a society in which each of us was constantly fearful of an attack to the invasion of our bodily integrity. Are there geographic areas of American society and the world that come close to this type of "lawlessness"?

The Common Law of Rape

The common law treated rape as a capital crime punishable by death.[1] In the United States, only homicide has been historically considered more serious than rape. In 1925, nineteen states and the District of Columbia, as well as the federal government, punished rape with capital punishment. This was particularly controversial because the penalty of death for rape was almost exclusively employed against African Americans, particularly when accused of raping Caucasian women. By 1977, only Georgia provided capital punishment for rape. In that same year, the U.S. Supreme Court declared the death penalty for rape unconstitutional on the grounds that it was disproportionate to the harm caused by the rape.[2] Today, most states divide rape into degrees of seriousness that reflect the circumstances of the offense. Aggravated rape may result in incarceration for a significant period of time and, in some jurisdictions, for life in prison.

The law of rape was rooted in the notion that a man's daughters and wife were his property, and that rape involved a trespass on a male's property rights. In fact, for a brief period of time the common law categorized rape as a trespass subject to imprisonment and fine. William Blackstone recounts that under ancient Hebraic law, the rape of an unmarried woman was punishable by a fine of fifty shekels paid to the woman's father and by forced marriage without the privilege of divorce. The commentary to the Model Penal Code observes that the notion of "the wife as chattel" is illustrated by the fact that as late as 1984, forty states recognized a "marital exemption" that provided that a husband could not be held liable for the rape of his wife.[3] Seventeenth-century English jurist Sir Matthew Hale explained that this exemption was based on the fact that a wife by "matrimonial consent and contract" had forfeited the privilege of refusing sexual favors to her husband.[4]

The law of rape is no longer an expression of property rights and today is designed to punish individuals who violate a victim's bodily integrity, psychological health and welfare, and sexual independence. The stigma and trauma that results from rape contribute to the reluctance of rape victims to report the crime to law enforcement authorities. Another factor contributing to the hesitancy of victims to report a rape is a lack of confidence that the criminal justice system will seriously pursue the prosecution and conviction of offenders.[5]

The criminal justice system is fairly effective in prosecuting what Professor Susan Estrich calls "real rape," or cases in which the victim is attacked by an unknown male. In such instances, the prosecution has little difficulty in demonstrating that the victim was forcibly subjected to sexual molestation. A greater challenge is presented in the area of so-called **acquaintance rape** or date

rape. In these cases, although no less serious, the perpetrator typically admits that sexual intercourse occurred and claims that it was consensual, while the victim characterizes the interaction as rape.[6] The reluctance to report rape may be most prevalent in the largely undocumented area of same-sex rape, which is a particularly serious problem in correctional institutions.[7]

Rape has profound, powerful, and long-lasting destructive physical and emotional consequences that often can only be overcome by years of therapy and treatment. The symptoms of **rape trauma syndrome** include:

- *Remembering the Event.* The victim has nightmares and replays the event in his or her mind.
- *Strong Emotions.* The victim may feel anger, guilt, and depression and may be drawn to suicide.
- *Psychological Impact.* Victims can lose self-confidence and develop an apprehension that they will be attacked once again. They often fear trusting others and withdraw from friends and relationships.
- *Physical Symptoms.* In addition to physical injury, victims suffer headaches and stress leading to physical illness. There also is the threat of HIV/AIDS.
- *Self-Medication.* Victims may attempt to find comfort in drug or alcohol abuse.

In reading about rape, keep in mind that jurors and judges are likely to bring a host of prejudices and preconceptions regarding the proper behavior of men and women to their consideration of the facts. What types of issues do you anticipate may arise in rape prosecutions?[8]

The Elements of the Common Law of Rape

The common law defined rape as the forcible carnal knowledge of a woman against her will. Carnal knowledge for purposes of rape is defined as vaginal intercourse by a man with a woman who is not his wife. The vaginal intercourse is required to be carried out by force or threat of severe bodily harm ("by force or fear") without the victim's consent.[9]

The common law of rape reflects a distrust of women, and various requirements were imposed to ensure that the **prosecutrix** (victim) was not engaged in blackmail or in an attempt to conceal a consensual affair or was not suffering from a psychological illness. The fear of an unjust conviction was reflected in Lord Matthew Hale's comment that rape "is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused though innocent." Lord Hale stressed that there was a danger that a judge and jury would be emotionally carried away by the seriousness of the charge and convict a defendant based on false testimony.[10]

The prosecution, as noted, was required to overcome a number of hurdles under the common law in order to convict the defendant:[11]

- *Immediate Complaint.* The absence of a **prompt complaint** by the victim to authorities was evidence that the complaint was not genuine.
- *Corroboration Rule.* The victim's allegation of rape required **corroboration**, evidence such as physical injury or witnesses.
- *Sexual Activity.* The victim's past sexual conduct or reputation for chastity was admissible as evidence of consent or on cross-examination to attack her credibility.
- *Judicial Instruction.* The judge was required to issue a cautionary instruction to the jury that the victim's testimony should be subject to strict scrutiny because rape is a crime easily charged and difficult to prove.

The crucial evidence in a prosecution for rape under the common law was a demonstration that the female "victim" did not consent to the sexual intercourse. Blackstone writes that a "necessary ingredient" in the crime of rape is that it is against the woman's will. He notes that it is a felony to forcibly ravish "even a concubine or harlot because the woman may have forsaken that unlawful course of life."[12]

The victim's lack of consent was demonstrated through outward resistance. In reference to sexual advances, a victim was required to **resist to the utmost** in order to establish a lack of consent. This expectation of combat against an attacker was viewed as reflecting "the natural instinct of every proud female to resist."[13] In *Brown v. State,* a sixteen-year-old woman recovering from the measles was attacked on a path near her family farm. The young woman was a virgin and testified

that she tried as "hard as I could to get away" and "screamed as hard I could . . . until I was almost strangled." The Wisconsin Supreme Court ruled that the prosecutrix failed to demonstrate that "she did her utmost" to resist. This not only requires "escape or withdrawal," but involves resistance "by means of hands and limbs and pelvic muscles." The alleged victim also failed to corroborate her complaint by "bruises, scratches and ripped clothing."[14] Courts did rule that resistance to the "utmost" was not required when the woman reasonably believed that she confronted a threat of "great and immediate bodily harm that would impair a reasonable person's will to resist."[15]

In the mid-twentieth century, judges began to relax this harsh resistance requirement. A few courts continued to require a fairly heavy burden of **earnest resistance**. Most, however, adopted the position that a victim was required to engage in **reasonable resistance** under the circumstances. Some judges argued that a more sensible approach would be to require that a female victim engage in that degree of resistance that is necessary to communicate her lack of consent to a reasonable person. This might be satisfied by a verbal protest. After all, it was pointed out that "no means no." Critics of a demanding resistance standard also pointed out that the victims of robbery or burglary are not required to demonstrate resistance. What is the thinking behind the resistance requirement? Which is the best test? How will perpetrators react to "earnest" or "reasonable" resistance?[16]

Resistance is not required under the common law standard when a victim is incapable of understanding the nature of intercourse as a result of intoxication, sleep, or a lack of consciousness.[17] Another exception is so-called **fraud in the *factum*** or "fraud in the nature of the act." In *People v. Minkowski,* a woman consented to treatment for menstrual cramps by a doctor who proceeded to insert a metal instrument. During the procedure he withdrew the metal object and without the consent of the patient inserted his sexual organ. The California court ruled that this was rape because the victim consented to a medical procedure and did not consent to intercourse.[18] This is distinguished from **fraud in inducement** or consent to intercourse that results from a misrepresentation as to the purpose or benefits of the sexual act. In one well-known case, a female consented to intercourse with a donor after being tricked into believing that the donor had been injected with a serum that would cure her alleged disease. The California appellate court ruled that this was not rape because the victim consented to the "thing done" and the fraud related to the underlying purpose rather than to the fact of the sexual interaction.[19]

Rape Reform

During the 1970s and 1980s, a number of states abolished the special procedures surrounding the common law of rape. This included the corroboration and prompt reporting provisions and the judge's cautionary instructions to the jury. Another important development that we will discuss later in the chapter is the adoption of **rape shield laws** prohibiting the introduction of evidence concerning a victim's past sexual activity.

The commentary to the Model Penal Code justifies these reforms on the grounds that rape trials had become focused on the sexual background and resistance of victims rather than on the conduct of defendants. The extraordinary resistance standard placed women in a "no win" situation. Resistance might lead to violent retaliation; a failure to resist might result in the defendant's acquittal.[20]

A number of states adopted new sexual assault statutes that fundamentally changed the law of rape. The statutes treated rape as an assault against the person rather than as an offense against sexual morality. These statutes refer to "criminal sexual conduct" or "sexual assault" rather than rape. The modified statutes widely differ from one another and typically incorporate one or more of the following provisions.[21]

- *Gender Neutral.* A male or a female may be the perpetrator or the victim of rape.
- *Degrees of Rape.* Several degrees of rape are defined that are distinguished from one another based on the seriousness of the offense. These statutes provide that involuntary sexual penetration is more serious than involuntary contact and that the use of force results in a more serious offense than an involuntary contact or penetration that is accomplished without the use of force.
- *Sexual Intercourse.* "Sexual intercourse" is expanded to include a range of forced sexual activity or forced intrusions into a person's body, including oral and anal intercourse and the insertion of an object into the genital or anal opening of another. Some statutes also prohibit "sexual contact" or the intentional and nonconsensual touching of an intimate portion of another individual's body for purposes of sexual gratification.

- *Consent.* Some statutes provide that consent requires free, affirmative, and voluntary cooperation or that resistance may be established by either words or actions. Other statutes provide that physical resistance is not required. Several continue to maintain the traditional standard that rape requires force along with an absence of consent.
- *Coercion.* There is explicit recognition that coercion may be achieved through fraud or psychological pressure as well as through physical force.
- *Marital Exemption.* A husband or wife may be charged with the rape of a spouse. Half of the states continue to recognize the exemption where there is no force or threat of force and some require a prompt reporting requirement. Others only recognize the marital exemption where the spouses are not living separate and apart.[22]

The important point to keep in mind is that these statutes have removed the barriers that have made rape convictions so difficult to obtain. States such as Michigan have adopted far-reaching reforms, whereas states such as Georgia have only introduced modest changes. Consider the following excerpt from the Pennsylvania criminal code (18 Pa. Cons. Stat.). How has Pennsylvania changed the common law of rape?

Section 3101. Definitions

"Forcible compulsion." Compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death. . . .

"Sexual intercourse." In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

Section 3104. Evidence of Victim's Sexual Conduct

Evidence of specific instances of the alleged victim's past sexual conduct . . . shall not be admissible in prosecutions. . . .

Section 3105. Prompt Complaint

Prompt reporting to public authority is not required. . . .

Section 3106. Testimony of Complainants

The testimony of the complainant need not be corroborated . . . [N]o instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

Section 3107. Resistance Not Required

The alleged victim need not resist the actor . . . however, . . . nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

Section 3121. Rape

Offense defined. A person commits a felony of the first degree [punishable by a maximum term of imprisonment of up to 20 years] when he or she engages in sexual intercourse with a complainant:

(1) By forcible compulsion.

(2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.

(3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.

(4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants, or other means for the purpose of preventing resistance.

(5) Who suffers from a mental disability which renders the complainant incapable of consent.

(6) Who is less than 13 years of age.

Section 3214.1. Sexual Assault

A person commits a felony of the second degree [punishable by a term of imprisonment, the maximum is which is not more than 10 years] when that person engages in sexual intercourse . . . with a complainant without the complainant's consent.

The Impact of Rape Reform

Have these statutes fundamentally changed the prosecution of rape? Despite rape reform, prosecutions for "acquaintance rape" inevitably seem to return to considerations of force, resistance, and consent.[23] In the trial of basketball star Kobe Bryant, the public dialogue centered on why the alleged victim accompanied Kobe Bryant to his hotel room and whether there were any indications of resistance. This discussion was complicated by the accusation that the alleged victim had engaged in sexual contact with other men immediately following Kobe Bryant.

We should mention one additional modern innovation in the law of rape. Some courts permit victims to present expert witnesses on the issue of rape trauma syndrome. This expert evidence is intended to support the victim's contention that she was raped by pointing out that the victim's psychological and medical condition is characteristic of rape victims. In other instances, experts are employed to educate the jurors that rape victims often have a delayed reaction and that the jurors should not conclude that an individual was not raped because the complainant did not immediately bring charges of rape or was seemingly calm and collected following the alleged attack.[24]

The Statutory Standard

Consider the difference between the Utah Code and the common law of rape.

Section 76–5-402. Rape

(1) A person commits rape when the actor has sexual intercourse with another person without the victim's consent.

(2) This section applies whether or not the actor is married to the victim.

(3) Rape is a felony of the first degree [punishable by 5 years-to-life in prison].

Section 76–5-402.2. Object Rape

A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal openings of another person who is 14 years or older, by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person, commits an offense which is punishable as a felony of the first degree.

Section 76–5-404. Forcible Sexual Abuse

A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

Forcible sexual abuse is a felony of the second degree [punishable by 1-to-15 years in prison].

Section 76–5-405. Aggravated Sexual Assault—Penalty

(1) A person commits aggravated sexual assault if in the course of a rape or attempted rape, object rape or attempted object rape, forcible sodomy or attempted forcible sodomy, or forcible sexual abuse or attempted forcible sexual abuse the actor:
   (a) causes bodily injury to the victim.
   (b) uses or threatens the victim with use of a dangerous weapon. . . .
   (c) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person; or
   (d) is aided or abetted by one or more persons.

(2) Aggravated sexual assault is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life imprisonment. . . .

Punishment and Sexual Assault

Sexual assault typically is divided into **aggravated rape** (or first degree) and simple (or second degree) rape. Aggravated rape in Vermont is punishable by a maximum of life imprisonment or fine of more than $50,000 or both. This requires serious bodily injury or death or the use or threat to use a deadly weapon or repeated rape, the perpetration of the rape by more than one individual, or a victim younger than the age of ten and a perpetrator who is at least eighteen years of age. In contrast, sexual assault in Vermont is punishable by a maximum of thirty-five years in prison or by a fine of not more than $25,000 or both. Sexual assault involves the compulsion of another to participate in a sexual act without consent or through threat or coercion or by placing the other person in fear of imminent bodily injury or by the administration of drugs or intoxicants as well as the sexual assault of a juvenile younger than sixteen by a parent or guardian.[25]

The *Actus Reus* of Modern Rape

The ***actus reus*** of rape requires the sexual penetration of the body of a rape victim by force. There are three approaches to defining the *actus reus*. Most states adhere to the common law and punish genital copulation. A second group of states that has followed the Model Penal Code expands this to include anal and oral copulation. A third group of states includes digital penetration and penetration with an instrument as well as genital, anal, and oral sex. The Model Penal Code and states such as Utah punish this last form of penetration as a less serious form of sexual assault.[26]

Virtually all jurisdictions have adopted gender-neutral statutes that provide that women as well as men may be the perpetrators or victims of rape. A woman, for instance, may be an accomplice to the rape of a male by restraining a male victim while he is being subjected to homosexual rape. As for sexual penetration, California's statute reflects the majority rule by providing that "sexual penetration, however slight, is sufficient to complete the crime." An emission is not required.[27] An Arizona appellate court noted that it was following the majority rule in affirming the rape conviction of an impotent defendant who was unable to attain an erection and only achieved a penetration of roughly one inch.[28]

The essence of the *actus reus* of the common law crime of rape remains the employment of force to cause another individual to submit to sexual penetration without consent. How much force is required? Professor Wayne LaFave observes that courts have followed two distinct approaches. The first is the **extrinsic force** approach that requires an act of force beyond the physical effort required to accomplish penetration. This ensures that the penetration is without the victim's consent. The **intrinsic force** standard only requires the amount of force required to achieve penetration. The intrinsic force standard is based on the insight that there may be a lack of consent despite the fact that the perpetrator employed little or no force to achieve penetration.

The next cases represent these two approaches to force. *Commonwealth v. Berkowitz* represents the extrinsic force standard. You should contrast this with *In the Interest of M.T.S.,* which illustrates the intrinsic force standard.

Was Berkowitz guilty of rape?

COMMONWEALTH v. BERKOWITZ, *609 A.2D 1338 (PA. SUPER. CT. 1992) 641 A.2D 1161 (PA. 1994)*

Facts

Robert Berkowitz . . . was convicted in the Court of Common Pleas, Monroe County, of rape and indecent assault and he appealed. The Superior Court, Philadelphia, reversed the rape conviction. The Commonwealth appealed to the Pennsylvania Supreme Court.

In the spring of 1988, appellant and the victim were both college sophomores at East Stroudsburg State University, ages twenty and nineteen years old, respectively. They had mutual friends and acquaintances. On April 19 of that year, the victim went to appellant's dormitory room. What transpired in that dorm room between appellant and the victim thereafter is the subject of the instant appeal.

During a one day jury trial held on September 14, 1988, the victim gave the following account during direct examination by the Commonwealth. At roughly 2:00 on the afternoon of April 19, 1988, after attending two morning classes, the victim returned to her dormitory room. There, she drank a martini to "loosen up a little bit" before going to meet her boyfriend, with whom she had argued the night before. Roughly ten minutes later she walked to her boyfriend's dormitory lounge to meet him. He had not yet arrived.

Having nothing else to do while she waited for her boyfriend, the victim walked up to appellant's room to look for Earl Hassel, appellant's roommate. She knocked on the door several times but received no answer. She therefore wrote a note to Mr. Hassel, which read, "Hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, [victim's name]." She did so, although she had not felt any intoxicating effects from the martini, "for a laugh."

After the victim had knocked again, she tried the knob on the appellant's door. Finding it open, she walked in. She saw someone lying on the bed with a pillow over his head, whom she thought to be Earl Hassel. After lifting the pillow from his head, she realized it was appellant. She asked appellant which dresser was his roommate's. He told her, and the victim left the note.

Before the victim could leave appellant's room, however, appellant asked her to stay and "hang out for a while." She complied because she "had time to kill" and because she didn't really know appellant and wanted to give him "a fair chance." Appellant asked her to give him a back rub but she declined, explaining that she did not "trust" him. Appellant then asked her to have a seat on his bed. Instead, she found a seat on the floor, and conversed for a while about a mutual friend. No physical contact between the two had, to this point, taken place. The victim testified on cross-examination that she explained that she was having problems with her boyfriend.

Thereafter, however, appellant moved off the bed and down on the floor, and "kind of pushed [the victim] back with his body. It wasn't a shove, it was just kind of a leaning-type of thing." Next appellant "straddled" and started kissing the victim. The victim responded by saying, "Look, I gotta go. I'm going to meet [my boyfriend]." Then appellant lifted up her shirt and bra and began fondling her. The victim then said "no."

After roughly thirty seconds of kissing and fondling, appellant "undid his pants and he kind of moved his body up a little bit." The victim was still saying "no" but "really couldn't move because [appellant] was shifting at [her] body so he was over [her]." . . . Appellant then tried to put his penis in her mouth. The victim did not physically resist, but rather continued to verbally protest, saying "No, I gotta go, let me go," in a "scolding" manner.

Ten or fifteen more seconds passed before the two rose to their feet. Appellant disregarded the victim's continual complaints that she "had to go," and instead walked two feet away to the door and locked it so that no one from the outside could enter. The victim testified that she realized at the time that the lock was not of a type that could lock people inside the room.

Then, in the victim's words, "[appellant] put me down on the bed. It was kind of like—he didn't throw me on the bed. It's hard to explain. It was kind of like a push but no. . . ." She did not bounce off the bed. "It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle."

Once the victim was on the bed, appellant began "straddling" her again while he undid the knot in her sweatpants. . . . He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because appellant was on top of her, and she "couldn't like go anywhere." She did not scream out at anytime because, "[i]t was like a dream was happening or something."

Appellant then used one of his hands to "guide" his penis into her vagina. At that point, after appellant was inside her, the victim began saying "no, no to him softly in a moaning kind of way . . . because it was just so scary." After about thirty seconds, appellant pulled out his penis and ejaculated onto the victim's stomach.

Immediately thereafter, appellant got off the victim and said, "Wow, I guess we just got carried away." To this the victim retorted, "No, we didn't get carried away, you got carried away." The victim then quickly

dressed, grabbed her school books and raced downstairs to her boyfriend, who was by then waiting for her in the lounge.

Once there, the victim began crying. Her boyfriend and she went up to his dorm room where, after watching the victim clean off appellant's semen from her stomach, he called the police.

Defense counsel's cross-examination elicited more details regarding the contact between appellant and the victim before the incident in question. The victim testified that roughly two weeks prior to the incident, she had attended a school seminar entitled, "Does 'no' sometimes mean 'yes'?" Among other things, the lecturer at this seminar had discussed the average length and circumference of human penises. After the seminar, the victim and several of her friends had discussed the subject matter of the seminar over a speaker-telephone with appellant and his roommate Earl Hassel. The victim testified that during that telephone conversation, she had asked appellant the size of his penis. According to the victim, appellant responded by suggesting that the victim "come over and find out." She declined.

When questioned further regarding her communications with appellant prior to the April 19, 1988 incident, the victim testified that on two other occasions, she had stopped by appellant's room while intoxicated. During one of those times, she had laid down on his bed. When asked whether she had asked appellant again at that time what his penis size was, the victim testified that she did not remember.

Appellant took the stand in his own defense and offered an account of the incident and the events leading up to it that differed only as to the consent involved. According to appellant, the victim had begun communication with him after the school seminar by asking him of the size of his penis and of whether he would show it to her. Appellant had suspected that the victim wanted to pursue a sexual relationship with him because she had stopped by his room twice after the phone call while intoxicated, lying down on his bed with her legs spread and again asking to see his penis. He believed that his suspicions were confirmed when she initiated the April 19, 1988, encounter by stopping by his room (again after drinking) and waking him up.

Appellant testified that, on the day in question, he did initiate the first physical contact, but added that the victim warmly responded to his advances by passionately returning his kisses. He conceded that she was continually "whispering . . . no's," but claimed that she did so while "amorously . . . passionately" moaning. In effect, he took such protests to be thinly veiled acts of encouragement. When asked why he locked the door, he explained that "that's not something you want somebody to just walk in on you [doing]."

According to appellant, the two then lay down on the bed, the victim helped him take her clothing off, and he entered her. He agreed that the victim continued to say "no" while on the bed, but carefully qualified his agreement, explaining that the statements were "moaned passionately." According to appellant, when he saw a "blank look on her face," he immediately withdrew and asked "Is anything wrong, is something the matter, is anything wrong?" He ejaculated on her stomach thereafter because he could no longer "control" himself. Appellant testified that after this, the victim "saw that it was over and then she made her move. She gets right off the bed . . . she just swings her legs over and then she puts her clothes back on." Then, in wholly corroborating an aspect of the victim's account, he testified that he remarked, "Well, I guess we got carried away," to which she rebuked, "No, we didn't get carried, you got carried away.'"

After hearing both accounts, the jury convicted appellant of rape and indecent assault. . . . Appellant was then sentenced to serve a term of imprisonment of one to four years for rape and a concurrent term of six to twelve months for indecent assault. . . .

Pennsylvania Supreme Court

Commonwealth v. Berkowitz, *641 A.2D 1161 (PA. 1994), Opinion by: Cappy, J.*

The Commonwealth appeals from an order of the Superior Court which overturned the conviction by a jury of Appellee, Robert A. Berkowitz, of one count of rape and one count of indecent assault. The Superior Court discharged Appellee as to the charge of rape. . . . For the reasons that follow, we affirm the Superior Court's reversal of the conviction for rape. . . .

Issue

The crime of rape is defined as follows:

18 Pennsylvania Consolidated Statutes Annotated (PCSA) Section 3121. Rape

A person commits a felony of the first degree when he engages in sexual intercourse with another person not one's spouse:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;

(3) who is unconscious; or

(4) who is so mentally deranged or deficient that such person is incapable of consent.

The victim of a rape need not resist. "The force necessary to support a conviction of rape . . . need only be such as to establish lack of consent and to induce the [victim] to submit without additional resistance. . . . The degree of force required to constitute rape is relative and depends on the facts and particular circumstance of the case." . . .

Was Berkowitz guilty of sexual intercourse with the victim by "forcible compulsion?"

Reasoning

In regard to the critical issue of forcible compulsion, the complainant's testimony is devoid of any statement that clearly or adequately describes the use of force or the threat of force against her. In response to defense counsel's question, "Is it possible that [when Appellee lifted your bra and shirt] you took no physical action to discourage him," the complainant replied, "It's possible." When asked, "Is it possible that [Appellee] was not making any physical contact with you . . . aside from attempting to untie the knot [in the drawstrings of complainant's sweatpants]," she answered, "It's possible." She testified, "He put me down on the bed. It was kind of like—He didn't throw me on the bed. It's hard to explain. It was kind of like a push but not—I can't explain what I'm trying to say." She concluded that "it wasn't much" in reference to whether she bounced on the bed, and further detailed that their movement to the bed "wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." She agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied. She testified that at no time did Appellee verbally threaten her. The complainant did testify that she sought to leave the room, and said "no" throughout the encounter. As to the complainant's desire to leave the room, the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it.

As to the complainant's testimony that she stated "no" throughout the encounter with Appellee, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force. . . . [W]here there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the "forcible compulsion" requirement . . . is not met. . . .

If the legislature had intended to define rape, a felony of the first degree, as nonconsensual intercourse, it could have done so. It did not do this. It defined rape as sexual intercourse by "forcible compulsion." If the legislature means what it said, then where, as here, no evidence was adduced by the Commonwealth that established either that mental coercion or a threat, or force inherently inconsistent with consensual intercourse was used to complete the act of intercourse, the evidence is insufficient to support a rape conviction. According, we hold that the trial court erred in determining that the evidence adduced by the Commonwealth was sufficient to convict appellant of rape. . . .

Holding

Reviewed in light of the above described standard, the complainant's testimony simply fails to establish that the Appellee forcibly compelled her to engage in sexual intercourse as required under 18 PCSA section 3121. Thus, even if all of the complainant's testimony was believed, the jury, as a matter of law, could not have found Appellee guilty of rape. . . . [T]he crime of indecent assault does not include the element of "forcible compulsion" as does the crime of rape. The evidence described above is clearly sufficient to support the jury's conviction of indecent assault. "Indecent contact" is defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 PCSA section 3101. Appellee himself testified to the "indecent contact." The victim testified that she repeatedly said "no" throughout the encounter. Viewing that testimony in the light most favorable to the Commonwealth as verdict winner, the jury reasonably could have inferred that the victim did not consent to the indecent contact. Thus, the evidence was sufficient to support the jury's verdict finding Appellee guilty of indecent assault.

Questions for Discussion

1. Why does the Pennsylvania Supreme Court rule that the evidence was insufficient to hold Berkowitz legally liable for rape? Can you explain why the court rules that Berkowitz was properly convicted of indecent assault?
2. What facts support the court's finding that Berkowitz did not use "forcible compulsion" in his sexual intercourse with the victim? Are there facts supporting the contention that Berkowitz did rely on "forcible compulsion"?
3. Why did the Pennsylvania Supreme Court opinion fail to highlight that in the past, the victim had made sexually provocative remarks to Berkowitz and had visited his dorm room? Is it significant that the victim's boyfriend reported the rape immediately after the victim informed him that she had sexual intercourse with Berkowitz?

Was M.T.S. guilty of rape?

In the Interest of M.T.S., *609 A.2D 1266 (N.J. 1992), Opinion by: Handler, J.*

Issue

Under New Jersey law a person who commits an act of sexual penetration using physical force or coercion is guilty of second-degree sexual assault. The sexual assault statute does not define the words "physical force." The question posed by this appeal is whether the element of "physical force" is met simply by an act of nonconsensual penetration involving no more force than necessary to accomplish that result. . . . The factual circumstances of this case expose the complexity and sensitivity of those issues and underscore the analytic difficulty of those seemingly straightforward legal questions.

Facts

On Monday, May 21, 1990, fifteen-year-old C.G. was living with her mother, her three siblings, and several other people, including M.T.S. and his girlfriend. A total of ten people resided in the three-bedroom town-home at the time of the incident. M.T.S., then age seventeen, was temporarily residing at the home with the permission of C.G.'s mother; he slept downstairs on a couch. C.G. had her own room on the second floor. At approximately 11:30 P.M. on May 21, C.G. went upstairs to sleep after having watched television with her mother, M.T.S., and his girlfriend. When C.G. went to bed, she was wearing underpants, a bra, shorts, and a shirt. At trial, C.G. and M.T.S. offered very different accounts concerning the nature of their relationship and the events that occurred after C.G. had gone upstairs. The trial court did not credit fully either teenager's testimony.

C.G. stated that earlier in the day, M.T.S. had told her three or four times that he "was going to make a surprise visit up in [her] bedroom." She said that she had not taken M.T.S. seriously and considered his comments a joke because he frequently teased her. She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hands inside of her pants, but that she had rejected all of his previous advances. C.G. testified that on May 22, at approximately 1:30 A.M., she awoke to use the bathroom. As she was getting out of bed, she said, she saw M.T.S., fully clothed, standing in her doorway. According to C.G., M.T.S. then said that "he was going to tease [her] a little bit." C.G. testified that she "didn't think anything of it"; she walked past him, used the bathroom, and then returned to bed, falling into a "heavy" sleep within fifteen minutes. The next event C.G. claimed to recall of that morning was waking up with M.T.S. on top of her, her underpants and shorts removed. She said "his penis was into [her] vagina." As soon as C.G. realized what had happened, she said, she immediately slapped M.T.S. once in the face, then "told him to get off [her], and get out." She did not scream or cry out. She testified that M.T.S. complied in less than one minute after being struck; according to C.G., "he jumped right off of [her]." She said she did not know how long M.T.S. had been inside of her before she awoke. C.G. said that after M.T.S. left the room, she "fell asleep crying" because "[she] couldn't believe that he did what he did to [her]." She explained that she did not immediately tell her mother or anyone else in the house of the events of that morning because she was "scared and in shock."

According to C.G., M.T.S. engaged in intercourse with her "without [her] wanting it or telling him to come up [to her bedroom]." By her own account, C.G. was not otherwise harmed by M.T.S. At about 7:00 A.M., C.G. went downstairs and told her mother about her encounter with M.T.S. earlier in the morning and said that they would have to "get [him] out of the house." While M.T.S. was out on an errand, C.G.'s mother gathered his clothes and put them outside in his car; when he returned, he was told that "[he] better not even get near the house." C.G. and her mother then filed a complaint with the police.

According to M.T.S., he and C.G. had been good friends for a long time, and their relationship "kept leading on to more and more." He had been living at C.G.'s home for about five days before the incident occurred; he testified that during the three days preceding the incident they had been "kissing and necking" and had discussed having sexual intercourse. The first time M.T.S. kissed C.G., he said, she "didn't want him to, but she did after that." He said C.G. repeatedly had encouraged him to "make a surprise visit up in her room."

M.T.S. testified that at exactly 1:15 A.M. on May 22, he entered C.G.'s bedroom as she was walking to the bathroom. He said C.G. soon returned from the bathroom, and the two began "kissing and all," eventually moving to the bed. Once they were in bed, he said, they undressed each other and continued to kiss and touch for about five minutes. M.T.S. and C.G. proceeded to engage in sexual intercourse. According to M.T.S., who was on top of C.G., he "stuck it in" and "did it [thrust] three times, and then the fourth time [he] stuck it in, that's when [she] pulled [him] off of her." M.T.S. said that as C.G. pushed him off, she said "stop, get off," and he "hopped off right away."

According to M.T.S., after about one minute, he asked C.G. what was wrong; she replied with a back-hand to his face. He recalled asking C.G. what was wrong a second time, and her replying, "[H]ow can you take advantage of me or something like that." M.T.S. said that he proceeded

to get dressed and told C.G. to calm down, but that she then told him to get away from her and began to cry. Before leaving the room, he told C.G., "I'm leaving . . . I'm going with my real girlfriend, don't talk to me . . . I don't want nothing to do with you or anything, stay out of my life . . . don't tell anybody about this . . . it would just screw everything up." He then walked downstairs and went to sleep.

On May 23, 1990, M.T.S. was charged with conduct that if engaged in by an adult would constitute second-degree sexual assault of the victim, contrary to New Jersey Statutes Annotated (NJSA) section 2C:14–2c(1). Following a two-day trial on the sexual assault charge, M.T.S. was adjudicated delinquent. After reviewing the testimony, the court concluded that the victim had consented to a session of kissing and heavy petting with M.T.S. The trial court did not find that C.G. had been sleeping at the time of penetration, but nevertheless found that she had not consented to the actual sexual act. Accordingly, the court concluded that the State had proven second-degree sexual assault beyond a reasonable doubt. On appeal, following the imposition of suspended sentences on the sexual assault and the other remaining charges, the Appellate Division determined that the absence of force beyond that involved in the act of sexual penetration precluded a finding of second-degree sexual assault. It therefore reversed the juvenile's adjudication of delinquency for that offense.

Reasoning

The New Jersey Code of Criminal Justice defines "sexual assault" as the commission "of sexual penetration . . . with another person" with the use of "physical force or coercion." An unconstrained reading of the statutory language indicates that both the act of "sexual penetration" and the use of "physical force or coercion" are separate and distinct elements of the offense. The parties offer two alternative understandings of the concept of "physical force" as it is used in the statute. The State would read "physical force" to entail any amount of sexual touching brought about involuntarily. A showing of sexual penetration coupled with a lack of consent would satisfy the elements of the statute. The Public Defender urges an interpretation of "physical force" to mean force "used to overcome lack of consent." That definition equates force with violence and leads to the conclusion that sexual assault requires the application of some amount of force in addition to the act of penetration. The new statutory provisions covering rape were formulated by a coalition of feminist groups assisted by the National Organization of Women (NOW) National Task Force on Rape. Both houses of the Legislature adopted the NOW bill, as it was called, without major changes and the Governor signed it into law on August 10, 1978.

Since the 1978 reform, the Code has referred to the crime that was once known as "rape" as "sexual assault." The crime now requires "penetration," not "sexual intercourse." It requires "force" or "coercion," not "submission" or "resistance." It makes no reference to the victim's state of mind or attitude, or conduct in response to the assault. It eliminates the spousal exception based on implied consent. It emphasizes the assaultive character of the offense by defining sexual penetration to encompass a wide range of sexual contacts, going well beyond traditional "carnal knowledge." Consistent with the assaultive character, as opposed to the traditional sexual character, of the offense, the statute also renders the crime gender-neutral: both males and females can be actors or victims.

The reform statute defines sexual assault as penetration accomplished by the use of "physical force" or "coercion," but it does not define either "physical force" or "coercion" or enumerate examples of evidence that would establish those elements. Some reformers had argued that defining "physical force" too specifically in the sexual offense statute might have the effect of limiting force to the enumerated examples. The task of defining "physical force" therefore was left to the courts.

The New Jersey Code of Criminal Justice does not refer to force in relation to "overcoming the will" of the victim, or to the "physical overpowering" of the victim, or the "submission" of the victim. It does not require the demonstrated nonconsent of the victim. As we have noted, in reforming the rape laws, the Legislature placed primary emphasis on the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant.

The Legislature's concept of sexual assault and the role of force were significantly colored by its understanding of the law of assault and battery. As a general matter, criminal battery is defined as "the unlawful application of force to the person of another." The application of force is criminal when it results in either (a) a physical injury or (b) an offensive touching. Thus, by eliminating all references to the victim's state of mind and conduct, and by broadening the definition of penetration to cover not only sexual intercourse between a man and a woman but a range of acts that invade another's body or compel intimate contact, the Legislature emphasized the affinity between sexual assault and other forms of assault and battery. . . .

The understanding of sexual assault as a criminal battery, albeit one with especially serious consequences, follows necessarily from the Legislature's decision to eliminate nonconsent and resistance from the substantive definition of the offense. Under the new law, the victim no longer is required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful. The alleged victim is not put on trial, and his or her responsive or defensive behavior is rendered immaterial. We are thus satisfied that an interpretation of the statutory crime of sexual assault to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed nonconsent.

We note that the contrary interpretation of force—that the element of force need be extrinsic to the sexual

act—would not only reintroduce a resistance requirement into the sexual assault law, but also would immunize many acts of criminal sexual contact short of penetration. The characteristics that make a sexual contact unlawful are the same as those that make a sexual penetration unlawful. An actor is guilty of criminal sexual contact if he or she commits an act of sexual contact with another using "physical force" or "coercion." NJSA § 2C:14–3(b). That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of a victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible.

Because the statute eschews any reference to the victim's will or resistance, the standard defining the role of force in sexual penetration must prevent the possibility that the establishment of the crime will turn on the alleged victim's state of mind or responsive behavior. We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of "physical force" is satisfied under NJSA § 2C:14–2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely given permission to the act of sexual penetration.

Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

Our understanding of the meaning and application of "physical force" under the sexual assault statute indicates that the term's inclusion was neither inadvertent nor redundant. The term "physical force," like its companion term "coercion," acts to qualify the nature and character of the "sexual penetration." Sexual penetration accomplished through the use of force is unauthorized sexual penetration. That functional understanding of "physical force" encompasses the notion of "unpermitted touching" derived from the Legislature's decision to redefine rape as a sexual assault.

As already noted, under assault and battery doctrine, any amount of force that results in either physical injury or offensive touching is sufficient to establish a battery.

Hence, as a description of the method of achieving "sexual penetration," the term "physical force" serves to define and explain the acts that are offensive, unauthorized, and unlawful.

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact. No one, neither a spouse, nor a friend, nor an acquaintance, nor a stranger, has the right or the privilege to force sexual contact.

We emphasize as well that what is now referred to as "acquaintance rape" is not a new phenomenon. Nor was it a "futuristic" concept in 1978 when the sexual assault law was enacted. Current concern over the prevalence of forced sexual intercourse between persons who know one another reflects both greater awareness of the extent of such behavior and a growing appreciation of its gravity. Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. One respected study indicates that more than half of all rapes are committed by male relatives, current or former husbands, boyfriends, or lovers. Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s.

The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy. It is one that was appreciated by the Legislature when it reformed the rape laws, reflecting an emerging awareness that the definition of rape should correspond fully with the experiences and perspectives of rape victims. Although reformers focused primarily on the problems associated with convicting defendants accused of violent rape, the recognition that forced sexual intercourse often takes place between persons who know each other and often involves little or no violence comports with the understanding of the sexual assault law that was embraced by the Legislature. Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform.

Holding

In short, in order to convict under the sexual assault statute in cases such as these, the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely given permission of the alleged victim. As we have indicated, such proof can be based on evidence of conduct or words in light of surrounding circumstances

and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely given or that such a belief was unreasonable under all of the circumstances. Thus, the State bears the burden of proof throughout the case. . . .

We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries. The trial court concluded that the victim had not expressed consent to the act of intercourse, either through her words or actions. We conclude that the record provides reasonable support for the trial court's disposition.

Accordingly, we reverse the judgment of the Appellate Division and reinstate the disposition of juvenile delinquency for the commission of second-degree sexual assault.

Questions for Discussion

1. Explain why the New Jersey Supreme Court ruled that the definition of "physical force" is satisfied if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be the affirmative and freely given permission to the act of sexual penetration.
2. What are the facts the prosecution is required to prove beyond a reasonable doubt to convict a defendant under the legal test established by the New Jersey Supreme Court? List the facts that are relied on by the New Jersey Supreme Court in concluding that the sexual penetration was without the affirmative and freely given permission of the victim.
3. Is there difficulty determining precisely what occurred in this case? As defense attorney, what questions would you ask the victim on cross-examination in order to undermine her direct testimony? What questions would you ask your client, the accused, on direct examination in the event that he testified?
4. As a juror, would you convict the defendant?
5. Do you believe that it is difficult to apply the legal test established by the New Jersey Supreme Court? What problems do you anticipate would confront a defendant in establishing that the alleged victim, in fact, affirmatively and freely engaged in sexual contact?
6. As a lawyer working for a New Jersey university, what points would you include in a guide to sexual conduct to be distributed to students in light of *M.T.S.?*
7. Do you favor the standard in *Berkowitz* or in *M.T.S.?*

Other Approaches to the *Actus Reus* of Modern Rape

The force requirement may also be satisfied by a threat of force. Statutes make this clear by stating that penetration may be accomplished by "force or threat of force" or by "force or coercion" or by "force or fear." In other words, actual force is not required.

There are two requirements that must be satisfied. First, there must be a threat of death or serious personal injury. Second, the victim's fear that the assailant will carry out the threat must be reasonable. The California statute provides that sexual intercourse constitutes rape where accomplished by "threatening to retaliate in the future . . . and there is a reasonable possibility that the perpetrator will execute the threat. . . . Threatening to retaliate means a threat to kidnap or falsely imprison or to inflict extreme pain, serious bodily injury, or death." The California statute also states that the threat requirement is satisfied where a public official threatens to "incarcerate, arrest, or deport the victim or another. . . ."[29] Michigan provides that a person is guilty of criminal sexual conduct where an individual engages in sexual penetration with another under circumstances in which the "actor is armed with a weapon or any article . . . fashioned . . . to lead the victim to reasonably believe it to be a weapon."[30]

Several states have extended the *actus reus* for rape and declare that it is criminal to use a position of trust to cause another person to submit to sexual penetration. Texas, for instance, has provisions covering public servants, therapists, and nurses. Clergy are held liable for causing another person to submit or participate in a sexual act by "exploiting the other person's emotional dependency."[31] Pennsylvania defines "forcible compulsion" to mean "physical, intellectual, moral, emotional or psychological force either express or implied."[32] This was narrowly interpreted by the Pennsylvania Supreme Court in ruling that it was not forcible compulsion for an adult guardian to threaten to send a fourteen-year-old girl back to a juvenile detention home unless she submitted to

vaginal intercourse and various deviate sexual acts. The court ruled that although the acts of the sixty-three-year-old guardian were despicable, the young woman was not coerced into the sexual activity because she voluntarily made a deliberate choice to undertake a course of conduct that enabled her to avoid return to the juvenile home.[33]

We have already mentioned that force is not required where penetration is achieved through fraud or when the victim is unconscious, asleep, or insane and is unaware of the nature of the sexual penetration. The California statute provides for rape when the victim is "prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance" or where an individual is "unconscious of the nature of the act. . . ."[34]

In these situations, a victim clearly is incapable of consent and the law finds rape. We shall see when we consider **statutory rape** that force is also not required where the victim is a juvenile.

Mens Rea

Rape at common law required that the male defendant intended to engage in vaginal intercourse with a woman whom he knew was not his wife through force or the threat of force. There was no clear guidance as to whether a defendant was required to be aware that the intercourse was without the female's consent. This issue remained unsettled for a number of years and only has been resolved in the last several decades.

The majority of states accept an "objective test" that recognizes it is a defense to rape that a defendant honestly and reasonably believed that the rape victim consented. This doctrine was first recognized by the California Supreme Court in *People v. Mayberry.* The prosecutrix claimed that she had been kidnapped while shopping and had involuntarily accompanied the kidnapper to an apartment where she was raped by the defendant and another male. The defendant denied the accusations and characterized the victim's story as "inherently improbable."

The California Supreme Court ruled that the defendant was entitled to have the jury receive a mistake of fact instruction, reasoning that the state legislature must have intended that such a defense be available given the seriousness of the charge. The court accordingly held that a defendant who "entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse . . . does not possess the wrongful intent that is a prerequisite . . . to a conviction of rape by means of force or threat."[35]

Some commentators argue that given the seriousness of the crime of rape, a defendant who genuinely believes that an individual has consented should be entitled to a mistake of fact defense, no matter how unreasonable his belief. The English House of Lords adopted a subjective approach in *Director of Public Prosecutions v. Morgan.* A married man invited three of his drinking companions over to his house to have intercourse with his wife. He assured his fellow military men that although she might protest, his wife enjoyed "kinky sex" and this was the only way she was able to get "turned on." The three held down the woman while they took turns having sexual intercourse with her.

The House of Lords ruled that rape requires a specific intent to have vaginal intercourse with a woman without her consent and acquitted the defendants based on their honest belief that the officer's wife consented to the sexual intercourse. As Lord Hailsham noted, "either the prosecution proves that the accused had the requisite intent or it does not."[36]

The English test is based on the premise that it is unfair to hold an individual liable who actually believes that an individual has consented. This approach, however, opens the door to defendants claiming this defense in virtually every acquaintance rape case. The subjective approach has been adopted with qualifications by the English Parliament and has been followed by only a small number of American courts.

Several states do not recognize the mistake of fact defense and continue to adhere to the view that a defendant's belief as to a victim's consent should not be considered in determining guilt. In *State v. Plunkett,* a physically imposing twenty-nine-year-old defendant intimidated and forced a seventeen-year-old woman who was a virgin into his house where, in response to his aggressive refusal to let her leave, she fearfully cooperated in oral, anal, and vaginal intercourse. The Kansas Supreme Court ruled that "[w]hether Plunkett thought his victim consented is irrelevant if the State proved that she did not consent and was overcome by fear. . . . Plunkett's argument that

there was insufficient evidence to show that he knew his sexual activity was nonconsensual is irrelevant." The difficulty with this approach is that rape is converted into a strict liability defense and that a defendant is liable regardless of the reasonableness of his or her belief concerning the victim's consent.[37]

A majority of states, as noted, have adopted the objective test. This requires *equivocal conduct,* meaning that the victim's nonconsensual reactions were capable of being reasonably, but mistakenly interpreted by the assailant as indicating consent. In the prosecution of heavyweight boxing champion Mike Tyson for the rape of a contestant in a beauty pageant that he was judging, an Indiana Court of Appeals held that Tyson was not entitled to a reasonable mistake of fact defense. Tyson's testimony indicated that the victim freely and fully participated in their sexual relationship. The victim, on the other hand, testified that Tyson forcibly imposed himself on her. The appellate court ruled that "there is no recitation of equivocal conduct by D.W. [the victim] that reasonably could have led Tyson to believe that D.W . . . appeared to consent . . . [N]o gray area existed from which Tyson can logically argue that he misunderstood D.W.'s actions."[38]

Statutory Rape

Sexual relations with a juvenile was not a crime under early English law so long as there was consent. This was modified by a statute that declared that it was a felony to engage in vaginal intercourse with a child younger than the age of ten, regardless of whether there was consent. This so-called statutory rape was incorporated into the common law of the United States. American legislatures gradually raised the age at which a child was protected against sexual intercourse to between eleven and fourteen. Statutory rape is based on several considerations:[39]

- *Understanding.* A minor is considered incapable of understanding the nature and consequences of his or her act.
- *Harmful.* Sexual relations are psychologically damaging to a minor and may lead to pregnancy.
- *Social Values.* This type of conduct is immoral and is contrary to social values.
- *Vulnerability.* The protection of females is based on the fact that males are typically the aggressors and take advantage of the vulnerability of immature females.

The general rule is that statutory rape is a strict liability offense in which a male is guilty of rape by engaging in intercourse with an "underage" female. This rule is intended to ensure that males will take extraordinary steps to ensure that females are of the age of consent.

Commentators have viewed strict liability for statutory rape as unjust in the case of a young woman who is physically mature and misrepresents her age. One reform is to provide that defendants can offer a "promiscuity defense" and document that the victim has had multiple sex partners and can be presumed to have possessed the capacity to appreciate the nature of her act and to have knowingly consented to a sexual relationship. A second approach is to divide the offense into various categories and to provide for more severe penalties for sexual relationships involving younger women. A third approach recognizes that young people will engage in sexual experimentation and that statutory rape should not be a crime where the parties are roughly the same age or should be punished less severely. Forty-five states now recognize statutory rape as a gender-neutral offense; only five states still restrict guilt to males.[40]

The major issue that arises in regard to statutory rape is whether this should remain a strict liability offense in which the mere act of penetration results in criminal liability. Should a reasonable mistake of fact regarding an individual's age constitute a defense?

The Model Penal Code limits strict liability to sexual relations with a woman younger than ten years of age. In such cases, the commentary explains that there is little likelihood of a reasonable mistake regarding the victim's age. The code punishes sexual intercourse with a woman sixteen years of age or younger by a male at least four years older as the less serious offense of corruption of a minor. A defendant charged with corruption of a minor is authorized under the code to offer a reasonable mistake of fact defense as to the age of the victim.[41]

Consider whether you favor imposing strict liability for statutory rape after reading *Garnett v. State.*

Did Garnett know that he was committing statutory rape?

Garnett v. State, *632 A.2D 797 (MD. 1993), Opinion by: Murphy, J.*

Facts

Maryland's "statutory rape" law prohibiting sexual intercourse with an underage person is codified in Annotated Code of Maryland (ACM) . . . article 27, section 463, which reads in full:

> Second-degree rape.
>
> (1) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (a) Who is under 14 years of age and the person performing the act is at least four years older than the victim.
>
> (2) Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years.

Now we consider whether under the present statute, the State must prove that a defendant knew the complaining witness was younger than fourteen and, in a related question, whether it was error at trial to exclude evidence that he had been told, and believed, that she was sixteen years old.

Raymond Lennard Garnett is a young retarded man. At the time of the incident in question he was twenty years old. He has an I.Q. of fifty-two. His guidance counselor from the Montgomery County public school system, Cynthia Parker, described him as a mildly retarded person who read on the third-grade level, did arithmetic on the fifth-grade level, and interacted with others socially at school at the level of someone eleven or twelve years of age. Ms. Parker added that Raymond attended special education classes and for at least one period of time was educated at home when he was afraid to return to school due to his classmates' taunting. Because he could not understand the duties of the jobs given him, he failed to complete vocational assignments; he sometimes lost his way to work. As Raymond was unable to pass any of the State's functional tests required for graduation, he received only a certificate of attendance rather than a high-school diploma.

In November or December 1990, a friend introduced Raymond to Erica Frazier, then aged thirteen; the two subsequently talked occasionally by telephone. On February 28, 1991, Raymond, apparently wishing to call for a ride home, approached the girl's house at about nine o'clock in the evening. Erica opened her bedroom window, through which Raymond entered; he testified that "she just told me to get a ladder and climb up her window." The two talked, and later engaged in sexual intercourse. Raymond left at about 4:30 the following morning. On November 19, 1991, Erica gave birth to a baby, of whom Raymond is the biological father.

Raymond was tried before the Circuit Court for Montgomery County on one count of second degree rape under § 463(a)(3) proscribing sexual intercourse between a person under fourteen and another at least four years older than the complainant.

The court found Raymond guilty. It sentenced him to a term of five years in prison, suspended the sentence and imposed five years of probation, and ordered that he pay restitution to Erica and the Frazier family.

Issue

Raymond asserts that the events of this case were inconsistent with the criminal sexual exploitation of a minor by an adult. As earlier observed, Raymond entered Erica's bedroom at the girl's invitation; she directed him to use a ladder to reach her window. They engaged voluntarily in sexual intercourse. They remained together in the room for more than seven hours before Raymond departed at dawn. With an I.Q. of fifty-two, Raymond functioned at approximately the same level as the thirteen-year-old Erica; he was mentally an adolescent in an adult's body. Arguably, had Raymond's chronological age, twenty, matched his sociointellectual age, about twelve, he and Erica would have fallen well within the four-year age difference obviating a violation of the statute, and Raymond would not have been charged with any crime at all.

The precise legal issue here rests on Raymond's unsuccessful efforts to introduce into evidence testimony that Erica and her friends had told him she was sixteen years old, the age of consent to sexual relations, and that he believed them. Thus the trial court did not permit him to raise a defense of reasonable mistake of Erica's age, by which defense Raymond would have asserted that he acted innocently without a criminal design.

Reasoning

At common law, a crime occurred only upon the concurrence of an individual's act and his guilty state of mind. In this regard, it is well understood that generally there are two components of every crime, the *actus reus* or guilty act and the *mens rea* or the guilty mind or mental state accompanying a forbidden act. The requirement that an accused acted with a culpable mental state is an axiom of criminal jurisprudence.

To be sure, legislative bodies since the mid-nineteenth century have created strict liability criminal offenses requiring no *mens rea*. Almost all such statutes responded

to the demands of public health and welfare arising from the complexities of society after the Industrial Revolution. Typically misdemeanors involving only fines or other light penalties, these strict liability laws regulated food, milk, liquor, medicines and drugs, securities, motor vehicles and traffic, the labeling of goods for sale, and the like. Statutory rape, carrying the stigma of felony as well as a potential sentence of twenty years in prison, contrasts markedly with the other strict liability regulatory offenses and their light penalties.

Modern scholars generally reject the concept of strict criminal liability.

The consensus is that punishing conduct without reference to an actor's state of mind is unjust since a person is subjected to a criminal conviction without being morally blameworthy. An individual who acts without a criminal intent neither needs to be punished in order to be deterred from future criminal activity nor incapacitated or reformed in order to remove a threat to society.

Conscious of the disfavor in which strict criminal liability resides, the Model Penal Code states generally as a minimum requirement of culpability that a person is not guilty of a criminal offense unless he acts purposely, knowingly, recklessly, or negligently. The Code allows generally for a defense of ignorance or mistake of fact negating criminal intent.

The commentators similarly disapprove of statutory rape as a strict liability crime. In addition to the arguments discussed above, they observe that statutory rape prosecutions often proceed even when the defendant's judgment as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age. Voluntary intercourse with a sexually mature teenager lacks the features of psychic abnormality, exploitation, or physical danger that accompanies such conduct with children.

Statutory rape laws are often justified on the "lesser legal wrong" theory or the "moral wrong" theory; by such reasoning, the defendant acting without *mens rea* nonetheless deserves punishment for having committed a lesser crime, fornication, or for having violated moral teachings that prohibit sex outside of marriage. We acknowledge here that it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to comprehend imperatives of sexual morality in any case.

The legislatures of seventeen states have enacted laws permitting a mistake of age defense in some form in cases of sexual offenses with underage persons. In addition, the highest appellate courts of four states have determined that statutory rape laws by implication required an element of *mens rea* as to the complainant's age. In the landmark case of *People v. Hernandez,* 393 P.2d 673 (Cal. 1964), the California Supreme Court held that, absent a legislative directive to the contrary, a charge of statutory rape was defensible wherein a criminal intent was lacking; it reversed the trial court's refusal to permit the defendant to present evidence of his good faith, reasonable belief that the complaining witness had reached the age of consent. In so doing, the court first questioned the assumption that age alone confers a sophistication sufficient to create legitimate consent to sexual relations, observing that "the sexually experienced fifteen-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent." The court then asked whether it could be considered fair to punish an individual who participates in a mutual act of sexual intercourse while reasonably believing his partner to be beyond the age of consent. . . .

We think it sufficiently clear, however, that Maryland's second-degree rape statute defines a strict liability offense that does not require the State to prove *mens rea;* it makes no allowance for a mistake-of-age defense. The plain language of ACM section 463, viewed in its entirety, and the legislative history of its creation lead to this conclusion. Section 463(a)(3) prohibiting sexual intercourse with underage persons makes no reference to the actor's knowledge, belief, or other state of mind. As we see it, this silence as to *mens rea* results from legislative design. . . . Second, an examination of the drafting history of section 463 during the 1976 revision of Maryland's sexual offense laws reveals that the statute was viewed as one of strict liability from its inception and throughout the amendment process. . . . [T]he Legislature explicitly raised, considered, and then explicitly jettisoned any notion of a *mens rea* element with respect to the complainant's age in enacting the law that formed the basis of current section 463(a)(3).

Holding

In the light of such legislative action, we must inevitably conclude that the current law imposes strict liability on its violators. This interpretation is consistent with the traditional view of statutory rape as a strict liability crime designed to protect young persons from the dangers of sexual exploitation by adults, loss of chastity, physical injury, and, in the case of girls, pregnancy. The majority of states retain statutes which impose strict liability for sexual acts with underage complainants. We observe again, as earlier, that even among those states providing for a mistake-of-age defense in some instances, the defense often is not available where the sex partner is fourteen years old or less; the complaining witness in the instant case was only thirteen.

Maryland's second degree rape statute is by nature a creature of legislation. Any new provision introducing an element of *mens rea,* or permitting a defense of reasonable mistake of age, with respect to the offense of sexual intercourse with a person less than fourteen, should properly result from an act of the Legislature itself, rather than judicial fiat. Until then, defendants in extraordinary cases, like Raymond, will rely upon the tempering discretion of the trial court at sentencing.

Dissenting, *Bell, J.*

To hold, as a matter of law, that ACM section 463(a)(3) does not require the State to prove that a defendant possessed the necessary mental state to commit the crime, i.e., knowingly engaged in sexual relations with a female under fourteen,

or that the defendant may not litigate that issue in defense, "offends a principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental" and is, therefore, inconsistent with due process.

In this case, according to the defendant, he intended to have sex with a sixteen-, not a thirteen-year-old girl. This mistake of fact was prompted, he said, by the prosecutrix herself; she and her friends told him that she was sixteen years old. Because he was mistaken as to the prosecutrix's age, he submits, he is certainly less culpable than the person who knows that the minor is thirteen years old, but nonetheless engages in sexual relations with her. Notwithstanding, the majority has construed ACM section 463(a)(3) to exclude any proof of knowledge or intent. But for that construction, the proffered defense would be viable. I would hold that the State is not relieved of its burden to prove the defendant's intent or knowledge in a statutory rape case and, therefore, that the defendant may defend on the basis that he was mistaken as to the age of the prosecutrix.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the eighteenth century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." . . . "[G]iven the tremendous difference between individuals, both in appearance and in mental capacity, there can be no . . . rational relationship between the proof of the victim's age and the defendant's knowledge of that fact."

Questions for Discussion

1. Summarize the argument of the majority and of the dissenting opinions.
2. Should vaginal intercourse with an individual younger than the age of fourteen be a strict liability offense? Would you provide for the defense of a reasonable mistake of fact as to the age of the victim?
3. Why did Raymond receive a "suspended sentence" rather than being sentenced to prison? In answering this question, discuss justifications for punishment.
4. Consider this quote from a judgment of the California Supreme Court recognizing a mistake of age defense: "The sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent. . . . [T]he [older] male is deemed criminally responsible for the act, although himself young and naïve and responding to advances which may have been made to him." Would you modify or abolish the crime of statutory rape? See *People v. Hernandez,* 293 P.2d 673 (Cal. 1964).

Withdrawal of Consent

In 2003, Illinois became the first state to pass a law on the **withdrawal of consent**. This legislation provides that a person "who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or conduct," 720 Illinois Compiled Statutes (ILCS) 5/12–14 (a)(2).

The Illinois law was passed in reaction to disagreement among courts in California as to whether an individual who continues sexual intercourse following the other party's withdrawal of consent is guilty of rape. The California Supreme Court resolved this conflict by ruling in the next case in the text, *People v. John Z.* The decision in *John Z.* has been followed by courts in Alaska, Connecticut, Kansas, Maryland, Minnesota, and South Dakota. Do you believe that a male who continues sexual relations under such circumstances is guilty of rape?

Should the law recognize Laura's withdrawal of consent to sexual intercourse?

People v. John Z., *60 P.3D 183 (CAL. 2003),* Opinion by: Chin, J.

The juvenile court . . . found that John Z. committed forcible rape . . . [and] committed him to Crystal Creek Boys Ranch. On appeal, defendant contends the evidence is insufficient to sustain the finding that he committed forcible rape. We disagree.

Facts

During the afternoon of March 23, 2000, seventeen-year-old Laura T. was working at Safeway when she received a call from Juan G., whom she had met about two weeks

earlier. Juan wanted Laura to take him to a party at defendant's home and then return about 8:30 P.M. to pick him up. Laura agreed to take Juan to the party, but since she planned to attend a church group meeting that evening she told him she would be unable to pick him up.

Sometime after 6:00 P.M., Laura drove Juan to defendant's residence. Defendant and Justin L. were present. After arranging to have Justin L.'s stepbrother, P. W., buy them alcohol, Laura picked up P. W. and drove him to the store where he bought beer. Laura told Juan she would stay until 8:00 or 8:30 P.M. Although defendant and Juan drank the beer, Laura did not.

During the evening, Laura and Juan went into defendant's parents' bedroom. Juan indicated he wanted to have sex but Laura told him she was not ready for that kind of activity. Juan became upset and went into the bathroom. Laura left the bedroom and both defendant and Justin asked her why she "wouldn't do stuff." Laura told them that she was not ready.

About 8:10 P.M., Laura was ready to leave when defendant asked her to come into his bedroom to talk. She complied. Defendant told her that Juan had said he (Juan) did not care for her; defendant then suggested that Laura become his girlfriend. Juan entered the bedroom and defendant left to take a phone call.

When defendant returned to the bedroom, he and Juan asked Laura if it was her fantasy to have two guys, and Laura said it was not. Juan and defendant began kissing Laura and removing her clothes, although she kept telling them not to. At some point, the boys removed Laura's pants and underwear and began "fingering" her, "playing with [her] boobs" and continued to kiss her. Laura enjoyed this activity in the beginning, but objected when Juan removed his pants and told defendant to keep fingering her while he put on a condom. Once the condom was in place, defendant left the room and Juan got on top of Laura. She tried to resist and told him she did not want to have intercourse, but he was too strong and forced his penis into her vagina. The rape terminated when, due to Laura's struggling, the condom fell off. Laura told Juan that "maybe it's a sign we shouldn't be doing this," and he said "fine" and left the room. (Although Juan G. was originally a codefendant, at the close of the victim's testimony he pled guilty to charges of sexual battery and unlawful sexual intercourse, a misdemeanor.)

Laura rolled over on the bed and began trying to find her clothes; however, because the room was dark she was unable to do so. Defendant, who had removed his clothing, then entered the bedroom and walked to where Laura was sitting on the bed and "he like rolled over [her] so [she] was pushed back down to the bed." Laura did not say anything and defendant began kissing her and telling her that she had "a really beautiful body." Defendant got on top of Laura, put his penis into her vagina "and rolled [her] over so [she] was sitting on top of him." Laura testified she "kept . . . pulling up, trying to sit up to get it out . . . [a]nd he grabbed my hips and pushed me back down and then he rolled me back over so I was on my back . . . and . . . kept saying, will you be my girlfriend." Laura "kept like trying to pull away" and told him that "if he really did care about me, he wouldn't be doing this to me and if he did want a relationship, he should wait and respect that I don't want to do this." After about 10 minutes, defendant got off Laura, and helped her dress and find her keys. She then drove home.

On cross-examination, Laura testified that when defendant entered the room unclothed, he lay down on the bed behind her and touched her shoulder with just enough pressure to make her move, a nudge. He asked her to lie down and she did. He began kissing her and she kissed him back. He rolled on top of her, inserted his penis in her and, although she resisted, he rolled her back over, pulling her on top of him. She was on top of him for four or five minutes, during which time she tried to get off, but he grabbed her waist and pulled her back down. He rolled her over and continued the sexual intercourse. Laura told him that she needed to go home, but he would not stop. He said, "[J]ust give me a minute," and she said, "[N]o, I need to get home." He replied, "[G]ive me some time" and she repeated, "[N]o, I have to go home." Defendant did not stop, "[h]e just stayed inside of me and kept like basically forcing it on me." After about a "minute, minute and [a] half," defendant got off Laura.

Defendant testified, admitting that he and Juan were kissing and fondling Laura in the bedroom, but claimed it was with her consent. He also admitted having sexual intercourse with Laura, again claiming it was consensual. He claimed he discontinued the act as soon as Laura told him that she had to go home.

Reasoning

Although the evidence of Laura's initial consent to intercourse with John Z. was hardly conclusive, we will assume for purposes of argument that Laura impliedly consented to the act, or at least tacitly refrained from objecting to it, until defendant had achieved penetration. As will appear, we conclude that the offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection.

People v. Vela, 218 Cal. Rptr. 161 (Cal. Ct. App. 1985), reasoned that "the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood. It would seem, therefore,

that the essential guilt of rape as stated in . . . section 263 is lacking in the withdrawn consent scenario."

As the Court of Appeal in this case stated, while outrage of the victim may be the cause for criminalizing and severely punishing forcible rape, outrage by the victim is not an element of forcible rape, "forcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it."

In the present case, assuming arguendo that Laura initially consented to, or appeared to consent to, intercourse with defendant, substantial evidence shows that she withdrew her consent and, through her actions and words, communicated that fact to defendant. Despite the dissent's doubt in the matter, no reasonable person in defendant's position would have believed that Laura continued to consent to the act. As the Court of Appeal below observed, "Given [Laura's testimony], credited by the court, there was nothing equivocal about her withdrawal of any initially assumed consent."

Vela appears to assume that, to constitute rape, the victim's objections must be raised, or a defendant's use of force must be applied, before intercourse commences, but that argument is clearly flawed. One can readily imagine situations in which the defendant is able to obtain penetration before the victim can express an objection or attempt to resist. Surely, if the defendant thereafter ignores the victim's objections and forcibly continues the act, he has committed "an act of sexual intercourse accomplished . . . against a person's will by means of force. . . ."

Issue

Defendant, candidly acknowledging *Vela*'s flawed reasoning, contends that, in cases involving an initial consent to intercourse, the male should be permitted a "reasonable amount of time" in which to withdraw, once the female raises an objection to further intercourse. As defendant argues, "By essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge. . . ."

Holding

We disagree with defendant's argument. Aside from the apparent lack of supporting authority for defendant's "primal urge" theory, the principal problem with his argument is that . . . there is no support for the proposition that the defendant is entitled to persist in intercourse once his victim withdraws her consent.

In any event, even were we to accept defendant's "reasonable time" argument, in the present case he clearly was given ample time to withdraw but refused to do so despite Laura's resistance and objections. Although defendant testified he withdrew as soon as Laura objected, for purposes of appeal we need not accept this testimony as true in light of Laura's contrary testimony. As noted above, Laura testified that she struggled to get away when she was on top of defendant, but that he grabbed her waist and pushed her down onto him. At this point, Laura told defendant that if he really cared about her, he would respect her wishes and stop. Thereafter, she told defendant three times that she needed to go home and that she did not accept his protestations he just needed a "minute." Defendant continued the sex act for at least four or five minutes after Laura first told him she had to go home. According to Laura, after the third time she asked to leave, defendant continued to insist that he needed more time and "just stayed inside of me and kept like basically forcing it on me," for about a "minute, minute and [a] half."

The judgment of the Court of Appeal is affirmed.

Dissenting, *Brown, J.*

The majority finds Laura's "actions and words" clearly communicated withdrawal of consent in a fashion "no reasonable person in defendant's position" could have mistaken. But, Laura's silent and ineffectual movements could easily be misinterpreted. . . . When asked if she had made it clear to John that she didn't want to have sex, Laura says "I thought I had," but she acknowledges she "never officially told him" she did not want to have sexual intercourse. When asked by the prosecutor on redirect why she told John "I got to go home," Laura answers: "Because I had to get home so my mom wouldn't suspect anything."

Furthermore, even if we assume that Laura's statements evidenced a clear intent to withdraw consent, sexual intercourse is not transformed into rape merely because a woman changes her mind. . . . Under the facts of this case, however, it is not clear that Laura was forcibly compelled to continue. All we know is that John Z. did not instantly respond to her statement that she needed to go home. He requested additional time. He did not demand it. Nor did he threaten any consequences if Laura did not comply.

The majority relies heavily on John Z.'s failure to desist immediately. But, it does not tell us how soon would have been soon enough. Ten seconds? Thirty? A minute? Is persistence the same thing as force? . . . And even if we conclude persistence should be criminalized in this situation, should the penalty be the same as for forcible rape? Such questions seem inextricably tied to the question of whether a reasonable person would know that the statement "I need to go home" should be interpreted as a demand to stop. Under these circumstances, can the withdrawal of consent serve as a proxy for both compulsion and wrongful intent?

Questions for Discussion

1. What facts support the conclusion that Laura clearly withdrew her consent? Could John Z. have reasonably believed that Laura desired to continue to engage in sexual intercourse?
2. Did the majority apply the extrinsic or intrinsic force test? Consider California Penal Code section 261.6, which defines consent to "mean positive cooperation in act or attitude pursuant to and exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."
3. How did the court distinguish *Vela* from *John Z.?*
4. Do you agree with dissenting Judge Brown that Laura was not forcibly compelled to continue the intercourse with John Z.? What of Judge Brown's argument that the majority of the California Supreme Court is equating "persistence" with "force"? Should a male be provided a "reasonable amount of time" to respond to a withdrawal of consent? This was the decision of the Kansas Supreme Court in *State v. Bunyard,* 133 P.3d 14 (Kan. 2006).
5. Would you hold John Z. guilty of rape? Is the continuation of sexual intercourse despite a withdrawal of consent the same crime as the forcible attack on an individual?

Rape Shield Laws

The common law permitted the defense to introduce evidence concerning a victim's prior sexual relations with the accused, prior sexual relations with individuals other than the accused, and evidence concerning the alleged victim's reputation for chastity. Would you find this type of evidence valuable in determining a defendant's guilt or innocence?

The law continues to permit the introduction of evidence relating to sexual activity between the accused and victim. The assumption is that an individual who voluntarily entered into a relationship with a defendant in the past is more than likely to have again consented to enter into a relationship with the accused. The thinking is that the defendant is entitled to have the jury consider and determine the weight (importance) to attach to this evidence in determining guilt.

Rape shield laws prohibit the defense from asking the victim about or introducing evidence concerning sexual relations with individuals other than the accused or introducing evidence concerning the victim's reputation for chastity. The common law assumed that such evidence was relevant in that an individual who has "already started on the road of [sexual unchastity] would be less reluctant to pursue her way, than another who yet remains at her home of innocence and looks upon such a [pursuit] with horror."

The other reason for this evidence was the belief that the jury should be fully informed concerning the background of the alleged victim in order to determine whether her testimony was truthful or was the product of perjury or of a desire for revenge.[42]

Rape shield laws prohibiting evidence relating to a victim's general sexual activity are based on several reasons:

- *Harassment.* To prevent the defense attorney from harassing the victim.
- *Relevance.* The evidence has no relationship to whether the victim consented to sexual relations with the defendant and diverts the attention of the jury from the facts of the case.
- *Prejudice.* The evidence biases the jury against the accused.
- *Complaints.* Victims are not likely to report rapes if they are confronted at trial with evidence of their prior sexual activity.

Rape shield laws do not prohibit the introduction of an accused's past sexual activity in every instance. The Sixth Amendment to the U.S. Constitution guarantees individuals a fair trial and provides that individuals have the right to confront the witnesses against them. Courts have permitted the introduction of a victim's past activity with others in those instances when it is relevant to the source of injury or semen or reveals a pattern of activity or a motive to fabricate. For instance, the fact that a victim had a sexual relationship with a man other than the accused before going to the hospital may be relevant for the source of injury or semen.

Consider the issue that confronted the trial court in *State v. Colbath.* The defendant and victim were in a bar. The victim made sexually provocative remarks to the defendant and permitted him to feel her breast and buttocks and rubbed his sexual organ. The two went to the defendant's trailer where they had sexual intercourse. The defendant's significant other arrived and assaulted

the woman, who defended her behavior by contending that she had been raped by the defendant. The trial judge rejected the defendant's effort to introduce evidence of the alleged victim's public sexual displays with other men in the bar and evidence that the victim had left the bar with other men prior to her approaching the defendant. The New Hampshire Supreme Court, however, held that despite the rape shield law, the defendant's Sixth Amendment right to confront witnesses against him required admission of evidence of the victim's conduct in the bar because it might indicate that at the time that the victim met the defendant, she possessed a "receptiveness to sexual advances."[43]

On the other hand, in *People v. Wilhelm,* a Michigan appellate court upheld a ruling excluding evidence that the victim had exposed her breasts to two men who were sitting at her table in a bar and that she permitted one of them to fondle her breasts. The court ruled that the victim's conduct in the bar did not indicate that she would voluntarily engage in sexual intercourse with the defendant.[44]

You Decide

10.1 Cottie Brown had been involved with the defendant Alston for roughly six months. They shared an apartment and when they fought she would return to live with her mother until he called to ask her to return. Brown testified that at times that she had sex with the defendant to "accommodate him." On these occasions, Brown would "stand still and remain entirely passive while the defendant undressed and had sexual intercourse with her." She testified that Alston beat her on occasion and that she left the apartment and ended the relationship after he struck her when she refused to give him money.

Alston appeared at Brown's technical school a month later and prevented her from entering the building and grabbed her arm, saying that she was going with him. Brown agreed to walk with Alston and he let go of her arm. Alston stated that Brown was going to miss class that day and threatened to "fix her face" to keep Brown's mother from continuing to interfere in their relations. Brown told him that their relationship was over and Alston replied that he had a right to make love to her again since "everyone could see her but him." Brown agreed to give Alston her address in an unsuccessful effort to persuade him to permit her to return to school. They passed a group of Alston's friends and finally arrived at the home of Lawrence Taylor. Alston briefly went to the back of the house and when he returned asked whether Brown she was "ready" and she replied that she "wasn't going to bed with him." Brown complied with Alston's order to lie down on the bed and the defendant pushed apart Brown's legs and had sexual intercourse with her. Brown testified that she cried, but did not attempt to push Alston off her. They then talked. At some point following this incident, Brown let Alston into her apartment after he threatened to kick down the door. He spent the night and the two made love several times. The defendant testified that she did not resist because she "enjoyed it." Was Alston guilty of the rape of Brown? See *State v. Alston,* 312 S.E.2d 470 (N.C. 1984).

You can find the answer at www.sagepub.com/lippmanccl2e

You Decide

10.2 Stephen F. (Child) appeals his convictions for two counts of criminal sexual penetration and argues that the trial court improperly excluded evidence of the alleged victim's past sexual activities. Child claimed that this evidence would have demonstrated her motive to fabricate. Under sections 30–9-11 through 30–9-15 of New Mexico Statutes, evidence of the victim's past sexual conduct and opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct shall not be admitted unless, and only to the extent, the court finds that the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Child (age fifteen) and the alleged victim (B.G., age sixteen) engaged in sexual intercourse. Child, B.G., and B.G.'s brother had been watching movies in B.G.'s bedroom. Child had been a friend of B.G.'s brother and family for nine years and usually slept on the couch in the living room when he spent the night. B.G. testified that after Child had headed for bed in the living room, he returned to her room and forced her to engage in sexual conduct, including oral, vaginal, and anal intercourse. The morning after the incident, B.G. told her mother that Child had raped her. Child was convicted of two counts of criminal sexual penetration. Child contended that the intercourse was consensual and claimed that B.G. lied because she feared that she would be punished by her religious parents. B.G. previously had been punished by her parents after having had consensual sexual relations with her then boyfriend. B.G. reportedly had told Child that her mother "was really upset . . . [about my having engaged in sex with my boyfriend;] she said that it was going to take her a long time to trust me again, . . . about three or four months[,] . . . and I wasn't allowed to go out on dates with guys." Child's theory was that B.G. was motivated to fabricate the claim of rape because she feared the punishment and disapproval of her parents, devout Christians who "don't believe in sex before marriage." The State of New Mexico opposed Child's motion to permit the cross-examination of the complaining witness in regard to her prior sexual conduct with her boyfriend on the grounds that this was intended to portray the complaining witness as an individual who is likely to engage in sexual activity

outside of marriage. According to the appellate court, there are five areas to consider in making a decision on this issue: (1) whether there is a clear showing that complainant committed the prior acts; (2) whether the circumstances of the prior acts closely resemble those of the present case; (3) whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias; (4) whether the evidence is necessary to the defendant's case; [and] (5) whether the probative value of the evidence outweighs its prejudicial effect.

As a judge, would you permit Child to cross-examine the complaining witness in regard to her sexual conduct with her boyfriend? See *State v. Stephen F.,* 152 P.3d 842 (N.M. Ct. App. 2007).

You can find the answer at www.sagepub.com/lippmanccl2e

Assault and Battery

For an international perspective on this topic, visit the study site.

Assault and battery, although often referred to as a single crime, in fact are separate offenses. A battery is the application of force to another person. An assault may be committed either by attempting to commit a battery or by intentionally placing another in fear of a battery. Notice that an assault does not involve physical contact. An assault is the first step toward a battery, and the law takes the position that it would be unfair to hold an individual liable for both an assault and battery. As a result, the assault "merges" into the battery, and an individual only is held responsible for the battery. A Georgia statute provides that an individual "may not be convicted of both the assault and completed crime."[45]

State statutes typically include assault and battery under a single "assault statute." Both offenses are considered misdemeanors. Serious assaults and batteries are punished as aggravated misdemeanors and aggravated batteries that are categorized as felonies.

The Elements of Battery

Modern battery statutes require physical contact that results in bodily injury or an offensive touching, a contact that is likely to be regarded as offensive by a reasonable person. Assault and battery is satisfied under the Model Penal Code by an intentional, purposeful, reckless, or negligent intent. The code punishes an individual who "purposely, knowingly or recklessly causes bodily injury to another or negligently causes bodily injury to another with a deadly weapon."[46]

Most state statutes narrowly limit the required intent. Illinois punishes the intentional or knowing causing of bodily harm to an individual or physical contact with an individual of an insulting or provoking nature.[47] Georgia limits battery to the intentional causing of "substantial physical harm or visible bodily harm to another." This includes, but is not limited to, substantially blackened eyes, substantially swollen lips or substantial bruises.[48]

In thinking about battery, you should be aware that a battery is not confined to the direct application of force by an individual. It can include causing substantial bodily harm by poisoning, bombing, a motor vehicle, illegal narcotics, or an animal. Minnesota, for instance, punishes causing "great or substantial harm" by intentionally or negligently failing to keep a dog properly confined.[49] In states with statutes punishing offensive physical contact, an uninvited kiss or sexual fondling may be considered a battery. A Washington court held that assault and battery includes spitting.[50]

You should also keep in mind that not every physical contact is a battery. We impliedly consent to physical contact in sports, medical operations, while walking in a crowd, or when a friend greets us with a hug or kiss. The law accepts that police officers and parents are justified in employing reasonable force. Reasonable force may also be used in self-defense or in defense of others.

Simple and Aggravated Battery

We earlier mentioned that a battery is a misdemeanor. Aggravated batteries are felonies and typically require:

- serious injury,
- the use of a dangerous or deadly weapon, or
- the intent to kill, rape, or seriously harm.

The Georgia battery statute punishes a second conviction for a simple battery with imprisonment of between ten days and twelve months with the possibility of a fine of not more than one

thousand dollars.[51] An aggravated battery in Georgia requires an attack that renders a "member" of the victim's body "useless" or "seriously disfigured" and is punishable by between one and twenty years in prison. The penalty is enhanced to between ten and twenty years when knowingly directed at a police or correctional officer and is punished by between five and twenty years when directed at an individual over sixty-five, is committed in a public transit vehicle or station, or is directed at a student or teacher. An aggravated battery is punished by between three and twenty years in prison when directed at a family member.[52]

California considers a battery as aggravated when committed with a deadly weapon, a caustic or flammable chemical, a taser or stun gun, or when the battery results in grievous bodily harm.[53] Illinois lists as an aggravated battery inserting a substance that may cause death or serious bodily harm in food, drugs, or cosmetics.[54] South Dakota considers the serious physical injury on an unborn child to be an aggravated assault.[55] A Minnesota statute punishes as battery the selling or provision of illegal narcotics that "causes great bodily harm" by imprisonment for not more than ten years and by payment of a fine of not more than $20,000.[56]

The federal government and sixteen states provide criminal penalties for female genital mutilation, a practice in which the sexual organs of young women are bound to prevent premarital sexual relations. The federal statute punishes "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person." This procedure is punished with a fine and imprisonment of not more than five years when applied against a person younger than eighteen.[57]

The common law crime of **mayhem** is included in the criminal codes of several states, including California. California defines mayhem when one deprives a human being of a "member of his or her body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip."[58] A well-known case of "malicious wounding" involved Lorena Bobbit who, while her husband John was asleep, dismembered his sexual organ and then left the house and tossed it out the car window onto the highway. Lorena claimed that John had raped her and she was subsequently found not guilty by reason of insanity and was committed to a mental institution for observation.

In summary, a battery involves:

- *Act.* The application of force that results in bodily injury or offensive contact. Aggravated battery statutes require a serious bodily injury. The contact must be regarded as offensive by a reasonable person.
- *Intent.* The intentional, knowing, reckless, or negligent application of force.
- *Consent.* An implied or explicit consent may constitute a defense under certain circumstances.

Assault

An assault may be committed by an attempt to commit a battery or by placing an individual in fear of a battery. Georgia defines an assault as an attempt to "commit a violent injury to the person of another; or . . . an act which places another in reasonable apprehension of immediately receiving a violent injury."[59]

California limits assault to an "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."[60] Illinois, on the other hand, provides that a person commits an assault when, "without lawful authority, he engages in conduct that places another in reasonable apprehension of receiving a battery."[61] An assault is a misdemeanor, punishable in California by imprisonment by up to six months in the county jail and by a possible fine of $2,000.[62] Ohio is among the states whose criminal code uses the term "menacing" rather than assault.[63]

A small number of states, including New York, recognize the offense of an attempted assault. The overwhelming majority of jurisdictions reject that an individual may be prosecuted for an "attempt to attempt a battery" on the grounds that this risks the conviction of individuals who have yet to take clear steps toward an assault.[64] A Georgia court in the nineteenth century also pointed out that prosecuting an individual for an attempt to attempt to commit a battery "is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the act is guilty of an assault, and he is not guilty until he has done the act . . . [a]n attempt to act is too [confused] for practical use." Do you agree that an attempt to commit an assault is "absurd"?[65]

Aggravated Assault

Aggravated assault is a felony and is generally based on factors similar to those constituting an aggravated battery.

Georgia provides three forms of aggravated assault that are punishable by between five and twenty years in prison: assault with intent to murder, rape, or rob; assault with a deadly weapon; and discharge of a firearm from within an automobile. The statute also punishes as an aggravated assault: an assault on a police or correctional officer, a teacher, or an individual sixty-five years of age or older, or an assault committed during the theft of a vehicle engaged in public or commercial transport.[66]

Illinois lists as aggravated assaults an assault committed while "hooded, robed or masked," and an assault committed with "a deadly weapon or any device manufactured and designed to be substantially similar in appearance to a firearm." An individual also commits an aggravated assault in Illinois when he or she knowingly and without lawful justification "shines or flashes a laser gunsight or other laser device that is attached or affixed to a firearm . . . so that the laser beam strikes near or in the immediate vicinity of any person."[67] Illinois also punishes under a separate statute "vehicular endangerment," the dropping of an item off a bridge with the intent to strike a motor vehicle.[68]

The crime of **stalking** is recognized in every state. Some of you may recall the stalking and killing of both young television actress Rebecca Schaeffer and rock star and former member of the Beatles John Lennon, and the attack on tennis star Monica Seles. A recent study indicates that 3.4 million Americans have been the victim of stalking, eleven percent of whom have been stalked for five years or more. The Illinois statute provides that a person commits stalking when he or she "on at least 2 separate occasions" follows another person or places the person under surveillance or any combination of these two acts. This must be combined with the transmittal of a threat of immediate or future bodily harm or the placing of a person in reasonable apprehension of immediate or future bodily harm or the creation of a reasonable apprehension that a family member will be placed in immediate or future bodily harm.[69] These acts, when combined with the causing of bodily harm, restraining the victim, or the violation of a judicial order prohibiting such conduct, constitute aggravated stalking.[70] Illinois, along with a number of other states and the federal government, has also passed laws to combat the new crime of **cyberstalking**. This involves transmitting a threat through an electronic device of immediate or future bodily harm, sexual assault, confinement, or restraint against an individual or family member of that person. The threat must create a "reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint."[71]

The next case, *Carter v. Commonwealth,* discusses some interesting issues involved in the legal standard for a threatened battery.

The Elements of Assault

In considering an *attempted-battery assault,* keep in mind:

- *Intent.* An attempt in most states to commit a battery requires an intent (purpose) to commit a battery.
- *Act.* An individual is required to take significant steps toward the commission of the battery.
- *Present Ability.* Some states require the present ability to commit the battery. In these jurisdictions, an individual would not be held liable for an assault where the assailant is unaware that a gun is unloaded. South Dakota, on the other hand, provides for a battery "with or without the actual ability to seriously harm the other person."[72]
- *Victim.* The victim need not be aware of the attempted battery.

The *assault of placing another in fear of a battery* requires:

- *Intent.* The intent (or purpose) to cause a fear of immediate bodily harm.
- *Act.* An act that would cause a reasonable person to fear immediate bodily harm. Words ordinarily are not sufficient and typically must be accompanied by a physical gesture that, in combination with the words, creates a reasonable fear of imminent bodily harm.
- *Victim.* The victim must be aware of the assailant's act and possess a reasonable fear of imminent bodily harm. A threat may be conditioned on the victim's meeting the demands of the assailant.

Model Penal Code

Section 211.1. Assault

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another; or
(b) negligently causes bodily injury to another with a deadly weapon; or
(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:

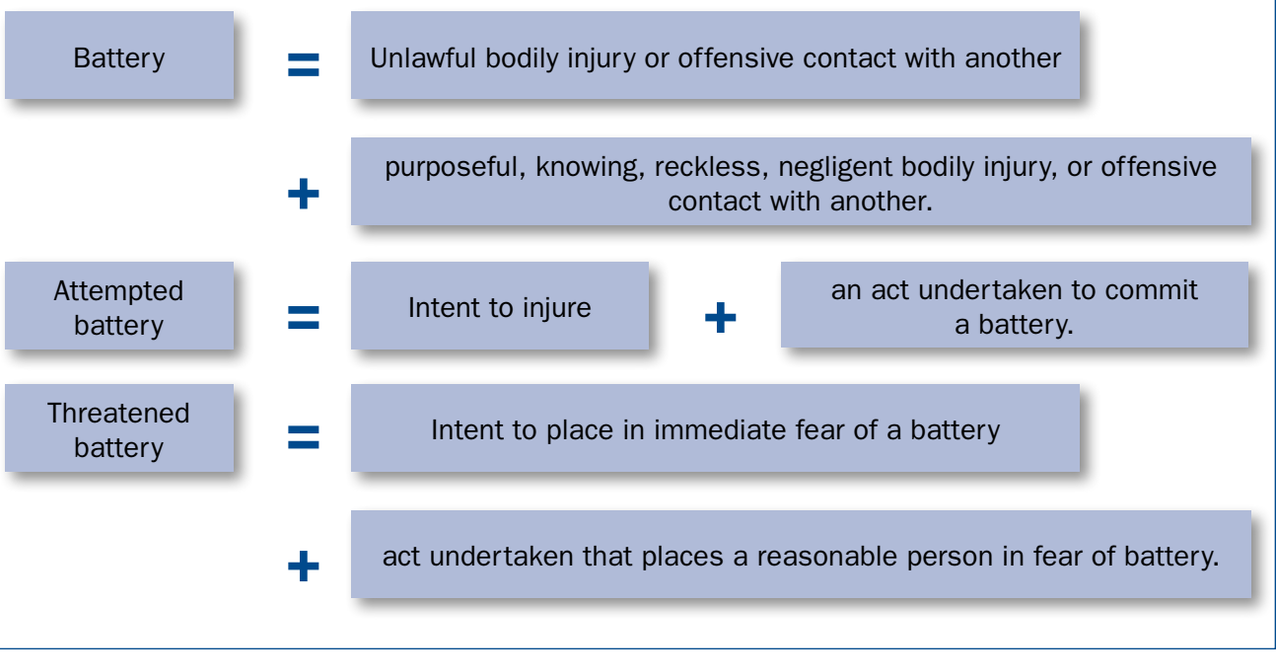
(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or
(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Analysis

1. The Model Penal Code eliminates the common law categories and integrates assaults and batteries into a single assault statute.
2. Assaults are graded into categories based on the gravity of the harm intended or actually caused.
3. Grading is not based on the identity of the victim.
4. Actual or threatened bodily injury or serious bodily injury is required. Offensive contact is excluded.
5. A deadly weapon includes poisons, explosives, caustic chemicals, handguns, knifes, and automobiles.

The Legal Equation



Did Carter place Officer O'Donnell in imminent fear of a battery?

Carter v. Commonwealth, *594 S.E.2D 284 (VA. CT. APP. 2004), Opinion by: Clements, J.*

Michael Anthony Carter was convicted in a bench trial of assaulting a police officer. . . . On appeal, he contends the evidence presented at trial was insufficient to support his conviction because the Commonwealth did not prove he had the present ability to inflict actual violence upon the officer. . . . [W]e affirm Carter's conviction.

Facts

The evidence presented to the trial court established that, on December 29, 1998, around 11:00 P.M., Officer B.N. O'Donnell of the City of Charlottesville Police Department observed a speeding car and, activating his vehicle's overhead flashing blue emergency lights, initiated a traffic stop. O'Donnell, who was on routine patrol at the time in a high crime area of the city, was driving a marked police vehicle and wearing his police uniform and badge. After the car pulled over, O'Donnell shone his vehicle's "take down" lights and spotlight onto the car and approached it on foot.

Two people were inside the car, the driver and Carter, who was seated in the front passenger seat. O'Donnell initiated a conversation with the driver, asking for his driver's license and registration and informing him why he had been stopped. The driver responded to O'Donnell in a "hostile" tone of voice. While conversing with the driver, O'Donnell used his flashlight to conduct a "plain view search" of the car to make sure there were no visible weapons or drugs in it. O'Donnell noticed that Carter had his right hand out of sight "down by his right leg." Carter then suddenly brought his right hand up and across his body. Extending the index finger on his right hand straight out and the thumb straight up, he pointed his index finger at the officer and said, "Pow." Thinking Carter "had a weapon and was going to shoot" him, O'Donnell "began to move backwards" and went for his weapon. A "split second" later, O'Donnell realized "it was only [Carter's] finger." O'Donnell testified: "The first thing I thought was that I was going to get shot. I—it's a terrifying experience, and if I could have gotten my weapon, I would have shot him." Immediately after the incident, O'Donnell, who was "visibly shaken," asked Carter "if he thought it was funny," and Carter responded, "Yes, I think it is funny."

Carter moved to strike the evidence, arguing the Commonwealth's evidence was insufficient to prove assault because it failed to prove Carter had the present ability to inflict actual violence upon the officer. The Commonwealth responded that proof of such ability was unnecessary as long as the evidence proved the officer reasonably believed Carter had the present ability to inflict actual bodily harm upon him.

The trial court agreed with the Commonwealth. Finding Carter's "act of pointing what the officer believed at the time to be a weapon at him" did, "in fact, place Officer O'Donnell in reasonable apprehension or fear," the trial court found the evidence sufficient to prove beyond a reasonable doubt that Carter was guilty of assault. Thus, the trial court denied Carter's motion to strike the evidence and subsequently convicted him of assaulting a police officer. . . . At sentencing, the court imposed a sentence of three years, suspending two years and six months.

Issue

Virginia Code Annotated section 18.2–57I provides, in pertinent part, that "any person [who] commits an assault . . . against . . . a law enforcement officer . . . engaged in the performance of his public duties as such . . . shall be guilty of a . . . felony."

On appeal, Carter asserts the Commonwealth failed to prove his conduct constituted an assault of a law enforcement officer because, in pointing his finger at the officer and saying "Pow," he did not have the present ability to inflict harm upon the officer, as required under the common law definition of assault. Thus, he contends, the trial court erred, as a matter of law, in finding the evidence sufficient to sustain a conviction for assault.

In response, the Commonwealth contends that, under long-established Virginia case law, a defendant need not have had the present ability to inflict harm at the time of the offense to be guilty of assault. It is enough, the Commonwealth argues, that, as in this case, the defendant's conduct created in the mind of the victim a reasonable fear or apprehension of bodily harm. Accordingly, the Commonwealth concludes, the trial court properly found the evidence sufficient to convict Carter of assaulting a police officer. . . .

Reasoning

While statutorily proscribed and regulated, the offense of assault is defined by common law in Virginia. (In this jurisdiction, we adhere to the common law definition of assault, there having been no statutory change to the crime.) . . . Assault has . . . long been defined at common law "as being (1) an attempt to commit a battery or (2) an intentional placing of another in [reasonable] apprehension of receiving an immediate battery." Today, most jurisdictions include both of these separate

types of assault, attempted battery and putting the victim in reasonable apprehension, within the scope of criminal assault. In Virginia, our Supreme Court has long recognized the existence of both concepts of assault in the criminal law context. . . .

The instruction under consideration . . . presents the question on which there is a sharp and irreconcilable conflict in the authorities on the subject; diametrically opposed positions being taken by the authorities. . . . We think that, both in reason and in accordance with the great weight of modern authority, . . . a present ability to inflict bodily harm upon the victim is not an essential element of criminal assault in all cases. Indeed, under those cases, to be guilty of . . . criminal assault, a defendant need have only an apparent present ability to inflict harm.

Holding

As previously discussed, the two types of criminal assault recognized at common law—attempted assault and putting the victim in reasonable apprehension of bodily harm—are separate and distinct forms of the same offense. They have different elements and are, thus, defined differently and applied under different circumstances. For these reasons, we hold that, under the common law definition of assault, one need not, in cases such as this, have a present ability to inflict imminent bodily harm at the time of the alleged offense to be guilty of assault. It is enough that one's conduct created at the time of the alleged offense a reasonable apprehension of bodily harm in the mind of the victim. Thus, an apparent present ability to inflict imminent bodily harm is sufficient to support a conviction for assault.

In this case, the trial court found that Carter's "act of pointing what the officer believed at the time to be a weapon at him" did, "in fact, place Officer O'Donnell in reasonable apprehension or fear." The evidence in the record abundantly supports this finding, and the finding is not plainly wrong. . . . O'Donnell testified that he thought he was "going to get shot." It was, he said, "a terrifying experience, and if I could have gotten my weapon, I would have shot him."

The trial court could reasonably conclude from these facts that the officer was terrified and thought he was about to be shot. That the officer's terror was brief does not alter the fact, as found by the trial court, that the officer believed for a moment that Carter had the intention and present ability to kill him. Moreover, under the circumstances surrounding the incident, we cannot say, as a matter of law, that such a belief was unreasonable. Thus, although Carter did not have a weapon, the trial court could properly conclude from the evidence presented that Carter had an apparent present ability to inflict imminent bodily harm and that his conduct placed Officer O'Donnell in reasonable apprehension of such harm.

Hence, the trial court did not err, as a matter of law, in finding the evidence sufficient to convict Carter of assault. . . . Accordingly, we affirm Carter's conviction for assault . . .

Dissenting, *Benton, J.*, with whom *Fitzpatrick, C.J.*, joins

The police officer testified that the "first thing I thought was that I was going to get shot. I—it's a terrifying experience, and if I could have gotten my weapon, I would have shot him. But it's—it happens . . . [in] a split second." The officer testified that Carter then "started laughing."

The common law definition of "assault" . . . does not encompass this type of intentional conduct, which is intended to startle but is performed without a present ability to produce the end if carried out. . . . I disagree with the majority opinion's holding that a conviction for criminal assault can be sustained in Virginia even though the evidence failed to prove the accused had a present ability to harm the officer. I would hold that Carter committed an "act accompanied with circumstances denoting an intention" to menace but it was not "coupled with a present ability . . . to use actual violence" or "calculated to produce the end if carried into execution."

Because Virginia continues to be guided by the common law rule concerning assault, I would hold that the conviction is not supported because the evidence failed to prove Carter acted "by means calculated to produce the end if carried into execution." Accordingly, I would reverse the conviction for assault.

Questions for Discussion

1. Explain the distinction between attempted battery and the assault of placing a victim in reasonable apprehension of bodily harm.
2. Compare and contrast the majority and dissenting opinions. Which is more persuasive?
3. Did Officer O'Donnell reasonably believe that he would be subjected to an immediate battery? Would Carter be criminally liable in the event that he pointed a pistol at O'Donnell that Carter knew was unloaded?
4. Would you convict Carter of assault?

Cases and Comments

Indirect Application of Force. Defendant Joseph Sherer placed random phone calls to over thirty women in Bozeman, Montana, in which he impersonated a doctor. Sherer claimed that he was treating their mother or daughter for a hereditary urinary disease for which they also might be at risk. Sherer asked various highly personal questions and requested that the women perform a test on themselves that involved a razor blade, knife, or fingernail polish remover. Three of the women harmed themselves in response to Sherer's directions and one sliced off her left nipple. Sherer claimed that his directions did not constitute an aggravated assault because he only indirectly caused the injuries. The Montana Supreme Court ruled that aggravated assault does not require that the defendant personally direct force toward a victim and that the resulting injury was precisely what Sherer intended to accomplish. Sherer's communications were held to be the cause of the victims' personal physical abuse. See *State v. Sherer,* 60 P.3d 1010 (Mont. 2002).

The next case, *Waldon v. State,* discusses "stalking." Consider whether the prosecution demonstrated beyond a reasonable doubt that the defendant knowingly or intentionally engaged in a course of conduct involving continuous or repeated harassment that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened.

Figure 10.1 Crime on the Streets: Intimate Partner Violence

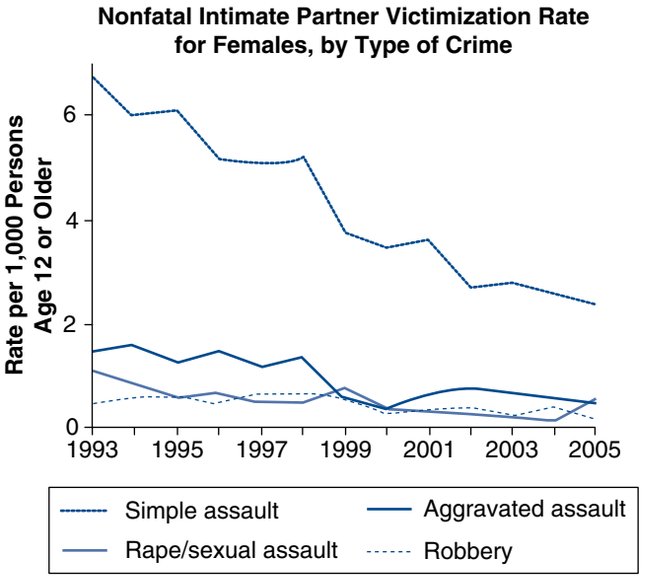
For nonfatal intimate partner violence, as for violent crime in general, simple assault is the most common type of violent crime.

The long-term trend for female victims of nonfatal intimate partner violence shows that between 1993 and 2005:

- the rate of simple assault declined by about two-thirds.
- the rate of aggravated assault declined by two-thirds.

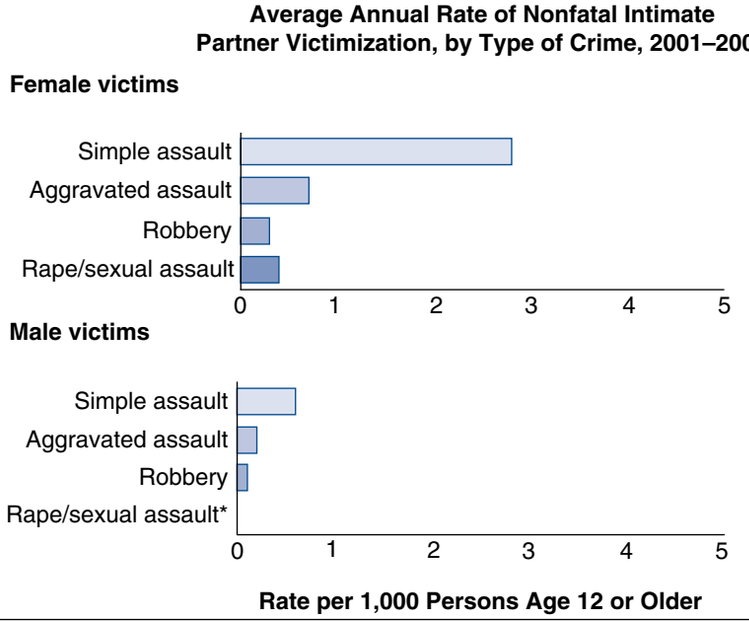
Nonfatal intimate partner violence is more likely to occur between the hours of 6 P.M. and 6 A.M.

- Females and males experienced nonfatal intimate partner victimization at similar times during the day and night.



Source: The National Crime Victimization Survey, U.S. Department of Justice.

On average between 2001 and 2005, females experienced higher rates of nonfatal intimate partner violence than males in each type of crime.



Source: The National Crime Victimization Survey, U.S. Department of Justice.

*Information about rape victimization of males is not provided because the small number of cases is insufficient for reliable estimates.

Did Waldon stalk his former wife?

Waldon v. State, *684 N.E.2D 206 (IND. CT. APP. 1997),* Opinion by: Sharpnack, C. J.

Facts

In April of 1993, Waldon married Val Majors, and they had a son. During the marriage, Majors worked as a nurse and taught classes at a dance studio. In November of 1994, Waldon and Majors divorced, stipulating to a mutual restraining order.

On the morning of December 5, 1994, Majors was driving home from the dance studio when she encountered Waldon. Waldon was walking down the street about two blocks away from the studio. Majors was fearful and alarmed to find Waldon so close to the studio.

On the morning of August 16, 1995, Majors again saw Waldon as she was leaving the parking lot of the studio. Waldon was walking at a "hurried" rate toward the entrance of the parking lot. Majors was intimidated and threatened by Waldon's actions.

On evening of August 20, 1995, Majors was leaving work from the hospital when she saw Waldon standing near the parking lot. He stood about twenty-five feet away from Majors and stared at her. Although Waldon did not approach her, Majors was frightened by him.

A few days later, Majors again saw Waldon near her studio. As Majors was getting into her car, Waldon walked slowly by her. Majors grew more fearful of her encounters with Waldon.

On the morning of November 1, 1995, Majors was getting into her car in the studio parking lot when she noticed Waldon staring at her through a fence about four feet away. Majors became very frightened and ran back to the studio. She then called the police and filed a report.

On the evening of November 7, 1995, Majors was teaching a dance class when she saw Waldon outside of the studio. Waldon was riding his bike around a dumpster in the parking lot. When the class ended, Majors was afraid to walk alone to her car, so she had a friend escort her. As Majors was leaving the parking lot, Waldon rode his bike in front of her car. Majors felt threatened by Waldon's actions.

On December 14, 1995, the State charged Waldon with stalking. After a trial on March 7, 1996, the jury found Waldon guilty as charged. The trial court later sentenced Waldon to six months. Waldon now appeals his conviction.

Issue

The first issue raised for our review is whether there was sufficient evidence to support Waldon's conviction for stalking. . . . Waldon was convicted under Indiana Code section 35–45–10–5(a), which provides that a "person who stalks another person commits stalking, a . . . misdemeanor." Stalking is defined as: "[A] knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened."

Waldon argues that the State failed to present sufficient evidence that his encounters with Majors caused her emotional distress. Waldon asserts that based on Majors' testimony, "the jury could not have reasonably inferred that Ms. Majors actually felt terrorized, intimidated or threatened by Mr. Waldon during these six encounters."

Reasoning

The record belies Waldon's assertion. During the trial, Majors testified that when she first saw Waldon near her studio, she became "fearful" and "alarmed." When Majors again saw Waldon near her studio, she felt intimidated and threatened. Next, when Majors encountered Waldon in the parking lot of the hospital, she was "afraid."

A few days later, when Majors saw Waldon near her studio, she suffered emotional distress. Majors described her distress as follows: "It makes you feel like you don't have a life, like you're violated, like you have to go, you know, hurry and lock your doors, look around, scan the parking lot. . . . It's frustrating. It's a violation and makes you fearful about what the intent is."

Majors further testified that "the most frightening" encounter with Waldon occurred outside of the studio. When Majors was getting into her car, she saw Waldon peering at her through a fence. Majors stated that she was "frightened because [she] was so vulnerable" and that the experience "was very upsetting." A week later, Majors had her last encounter with Waldon near the studio. Again, Majors felt threatened and intimidated by Waldon's actions.

Holding

Contrary to Waldon's assertion, Majors testified that each of her encounters with Waldon caused her emotional distress. Based on her testimony, we find evidence of probative value from which the jury could conclude that Waldon caused her "to feel terrorized, frightened, intimidated, or threatened." Therefore, the evidence was sufficient to support Waldon's conviction for stalking. . . .

Dissenting, *Barteau, J.*

In support of the stalking charge, the State presented evidence that six times during a one-year time span, Majors observed Waldon in various degrees of proximity to herself. . . . In all but two instances, no eye contact between Majors and Waldon occurred. Given the lack of eye contact, it is possible that Waldon did not see Majors even though she saw him. Four out of the six times Majors observed Waldon, Majors was driving her car. In describing three of those instances, Majors testified that she felt safe in her car. In none of the instances did Waldon make a verbal threat, a physical threat, or even an obscene gesture.

"Stalking" is defined by statute as: a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened. Specifically excluded from the definition of stalking is statutorily or constitutionally protected activity.

"Harassment" is defined as: conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes.

"Impermissible contact" includes, but is not limited to, knowingly or intentionally following or pursuing the victim.

In this case, there was no evidence to support a finding that Waldon intended to harass Majors. Six sightings of an ex-husband in public places during a one-year period do not amount to harassment. There is nothing in the record which would indicate that the six times Majors observed Waldon were anything but chance or coincidental encounters. In three of those encounters, there is no evidence that Waldon even realized he was involved in an encounter. While an individual might dislike a former spouse or might be afraid to be in the vicinity of a former spouse, that person's subjective reasons for wishing that the former spouse be elsewhere cannot transform the former spouse's innocent activities into behavior sufficient to support a criminal conviction. . . .

Here, the encounters between Majors and Waldon were personally upsetting to Majors; they made her upset and fearful. However, there is nothing about the encounters which could make a reasonable person feel harassed, absent some preconceived idea concerning Waldon's intentions. While Waldon's presence in places Majors frequented may have been frightening to her, Majors' fear cannot form the basis for a determination that Waldon entertained the intent to harass Majors.

Indiana cases interpreting the current stalking statute emphasize this point. In *Burton v. State,* 665 N.E.2d 924 (Ind. Ct. App. 1996), Burton made several telephone calls to the victim, leaving messages such as: "Hi whore," . . . "I hope you have the f—ing windows secured," and "I am coming in the morning." Burton was also seen outside the victim's house. From this behavior a reasonable person could conclude that Burton entertained the intent to harass the victim.

In *Hendricks v. State,* 649 N.E.2d 1050 (Ind. Ct. App. 1995), Hendricks was enamored with a thirteen-year-old girl who did not share his passion. Hendricks threatened the girl, attempted to pay others to assault her, repeatedly telephoned her home and would stand outside her home with a baseball bat and stare. This type of activity by Hendricks could lead a reasonable person to conclude that Hendricks entertained the intent to harass the victim.

In *Johnson v. State,* 648 N.E.2d 666 (Ind. Ct. App. 1995), Johnson came to Indianapolis searching for the victim, who had fled from Johnson several times previously and was secluded at a shelter to avoid Johnson. He harassed people outside the shelter on two occasions while attempting to gather information on the victim. He also appeared beside her when she went to the prosecutor's office for help, and even though she indicated she did not wish to speak with him he continued to whisper to her turned back. A reasonable person examining Johnson's conduct could find that he entertained the intent to harass the victim.

In all of these cases, an examination of the defendant's actions alone, without consideration of the victim's subjective perceptions, could lead a reasonable person to the conclusion that the defendant entertained the intent to harass. That is not true in the case before us. Waldon's actions evince no intent to harass when viewed without considering Major's subjective perception. For this reason, the evidence is insufficient to sustain Waldon's stalking conviction. I would reverse with instructions to enter a judgment of not guilty.

Questions for Discussion

1. Describe Waldon's behavior. What was Majors's reaction? Was this a reasonable reaction?
2. What is the basis for Judge Barteau's disagreement with the majority? Consider how he differs in his discussion of Waldon's behavior and Majors's reaction.
3. Was Waldon's conduct protected under the First Amendment? Would you hold Waldon liable under the stalking statute?

You Decide

10.3 Jason Chambers, in a jealous rage, drove his automobile into a car in which his former lover was a passenger and that was owned and driven by Kelly, her current lover. The prosecutor relied on a theory of a threatened battery rather than an attempted battery and charged Chambers with assault with a dangerous weapon. Kelly testified that he saw a car coming down the street that "aimed for my car and hit it." The other two passengers testified that they had been unaware of the approaching automobile. Was Chambers guilty under the prosecution's theory of attempted battery? Could Chambers be prosecuted for assault with a dangerous weapon? See *Commonwealth v. Chambers,* 781 N.E.2d 37 (Mass. App. Ct. 2003).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

In late November 2004, Eagle County, Colorado, prosecutor Mark Hurlbert charged Los Angeles Lakers superstar basketball player Kobe Bryant with sexually assaulting a nineteen-year-old woman. Fifteen months later, the same prosecutor stood before the trial court and was granted a motion by the judge to dismiss the case. The prosecutor explained that the victim no longer desired to testify against Kobe Bryant.

The Eagle County prosecutor's office had spent $230,000 on this unsuccessful prosecution, ten percent of its entire budget. Basketball fans of the Lakers expressed relief that the twenty-four-year-old Bryant, who if convicted faced a possible prison sentence of up to life, would be available to play for the Lakers.

Bryant entered the National Basketball Association right out of high school at age eighteen and had been selected to play in the NBA All-Star game five times and already had played on three championship teams. Experts predicted that he would rank among the best players in league history by the time he retired.

Bryant insisted that the intercourse had been consensual. Observers, nevertheless, predicted that Bryant would never recover from the public humiliation. His squeaky clean public image had been tarnished by the public admission that he had committed adultery against his wife of two years, who had given birth to the couple's first child in January. In fact, he admitted during a police interview following his arrest that he earlier had been involved with yet

another woman. The transcript of Bryant's conversation with the police indicates that he was primarily concerned with whether his public image would be damaged and with the reaction of his wife. He initially denied intercourse with the complainant and changed his mind after the investigators informed him that the physical evidence indicated that the two had engaged in intercourse.

Several days following Bryant's arrest, he purchased a four-million-dollar diamond ring for his wife, who supported her husband throughout his legal ordeal. It later was revealed that Bryant had contemplated divorce several months earlier and that as a result, his wife had been hospitalized and placed on life support. The mere bringing of the sexual assault charge against Bryant resulted in his losing multimillion-dollar endorsements with leading American corporations.

The alleged victim worked at the front desk at a spa located in small mountain town one hundred miles west of Denver where Bryant was staying while preparing for knee surgery at a nearby clinic. Bryant invited her to his room. She initially alleged that he immediately assaulted her and then later indicated that Bryant unexpectedly escalated a consensual encounter and that she had cried and at least twice said "no" as he pushed her over a chair and entered her from the rear.

The media quickly shifted the focus from Kobe Bryant to the unnamed victim, whose name later was mistakenly posted on an Eagle County court Web site. Press reports indicated that she was a former high school cheerleader who reportedly had auditioned for the show "American Idol" and was described by some acquaintances as desperate for attention and notoriety. Other sources told of two suicide attempts during the past year and her hospitalization by the University of Northern Colorado campus police, who feared that she posed a "danger to herself." The media interviewed every resident of the victim's hometown who was willing to speak, leading to a blizzard of supportive as well as skeptical comments. Two Lakers fans were sufficiently upset to issue death threats against the complainant, resulting in their imprisonment.

Documents and testimony from closed court hearings were leaked to the press. This information indicated that the complainant had sexual intercourse with at least one other individual after she left Bryant and before she contacted the police. The judge would later rule that the defense was entitled to introduce evidence of the complainant's sexual activity during the three days prior to her hospital examination on July 1, 2003, on the grounds that this was relevant to the cause of her injuries, source of DNA, and her credibility as a witness. Information was also leaked documenting that she received a substantial amount of money from a state victim compensation fund to address mental health concerns stemming from her alleged sexual assault by Kobe Bryant.

The news stories on Bryant marveled over the fact that he was able to attend court hearings and then fly hundreds of miles to Lakers games and still perform at a high level. Speculation focused on whether Bryant would continue to play with the Lakers when his contact expired. This question was answered several months prior to the dismissal of the charges, when Bryant signed a seven-year contact for more than $136.4 million.

Following the dismissal of the charges against Bryant, fans expressed relief and the Lakers issued a statement of support. Bryant circulated a press release in which he recognized that although he viewed the affair as consensual, "she did not," and he issued an apology to the complainant and her family for his behavior. Advocates for victims of sexual assault were quoted as bemoaning that the Bryant case would have the impact of discouraging women from bringing complaints of rape to prosecutors who, in turn, would be reluctant to file charges.

Colorado seemed to be a center of controversy concerning sexual abuse. A report issued by an independent investigative commission in May 2004 indicated that at least nine women had alleged that they had been sexually assaulted by University of Colorado football players or recruits since 1997. The most infamous incident involved a female kicker on the football team who alleged that she had been subjected to sexual assaults and rape. Her father, an army surgeon stationed in Iraq, stated that the university had been completely unresponsive to his complaints over the treatment of his daughter. Colorado football coach Gary Barnett was suspended for several months during an investigation after telling the press that Katie was an "awful" player who could not kick the ball through the uprights. Do athletes receive preferential treatment when accused of sexual abuse? On the other hand, are they more often than not the target of false allegations?

Kidnapping

Kidnapping at common law was the forcible abduction or stealing away of a person from his or her own country and sending him into another country.[73]

This misdemeanor was intended to punish the taking of an individual to an isolated location where the victim was outside of the protection law. Imagine the fear you would experience in the event that you were locked in a basement under the complete control of an abusive individual.

Kidnapping became of concern in 1932 with the kidnapping of the twenty-month-old son of Charles Lindbergh, the aviation hero who piloted the "Spirit of St. Louis" in the first flight across the Atlantic. Lindbergh paid the $50,000 ransom demanded for the return of Charles Jr., who later was found dead in the woods five miles from the Lindbergh home. A German immigrant, Bruno

For a deeper look at this topic, visit the study site.

Hauptmann, was prosecuted for felony murder and executed. The question whether Hauptmann was the perpetrator continues to be a topic of intense debate.

The Lindbergh kidnapping resulted in the adoption of the Federal Kidnapping Act, known as the "Lindbergh Law." This law prohibits the kidnapping and carrying of an individual across state lines for the purpose of obtaining a ransom or reward. Six states shortly thereafter adopted new statutes significantly increasing the penalty for kidnapping. This trend continued and, by 1952, all but four states punished kidnapping by death or life imprisonment.

The Lindbergh Law excluded parents from coverage. In 1981, Congress addressed the 150,000 abductions of children by a parent involved in a custody dispute in the Parental Kidnapping Prevention Act. The statute provides for FBI jurisdiction when a kidnapped child is transported across state lines. The abduction of children by a parent or relative involved in a custody dispute is also the subject of specific state statutes punishing a "relative of a child" who "takes or entices" a child younger than eighteen from his or her "lawful custodian."[74]

The last decades have been marked by a string of high-profile kidnappings of wealthy corporate executives and members of their families. In 1974, Patricia Hearst, heiress to the Hearst newspaper fortune, was kidnapped from her campus apartment at the University of California at Berkeley. The abduction was carried out by the Symbionese Liberation Army (SLA), a self-proclaimed revolutionary group. The case took on a bizarre character when Hearst participated in bank robberies intended to finance the activities of the group. Patricia Hearst was later apprehended and convicted at trial despite her claim of "brainwashing." The major figures in the SLA were subsequently killed in a shoot-out with the Los Angeles police.

More recently we have seen the 1993 abduction and killing of twelve-year-old Polly Klaas and the kidnapping, in 2002, of twelve-year-old Elizabeth Smart. Elizabeth was later found to have been forced into a "marriage" with her abductor, a handyman in the Smart home.

Following American intervention into Iraq, foreigners were regularly kidnapped by criminal gangs who "sold" the victims to political groups opposed to the presence of the United States. The terrorists typically threatened to kill the hostage unless the company for which the prisoner worked or their country of nationality agreed to withdraw from Iraq. In a related incident, *Wall Street Journal* reporter Daniel Pearl was kidnapped and beheaded by an extremist group in Pakistan. The terrorist group's British-born leader, Ahmad Omar Saeed Sheikh, was later prosecuted and sentenced to death in Pakistan. The taking of hostages is recognized as a crime under the International Convention Against the Taking of Hostages, which requires countries signing the treaty to either prosecute offenders or to send them to a nation claiming the right to prosecute the offender.

The U.S. Congress has also enacted the Victims of Trafficking and Violence Protection Act of 2000 and the PROTECT Act of 2003 that together combat the international sexual trafficking industry. Roughly one million children, most of whom are girls, have been persuaded to leave or are forcibly abducted from their mostly rural villages in poor countries and forced into sexual slavery or low-wage industrial labor.

Criminal Intent

Kidnapping statutes vary widely in their requirements. The California Penal Code section 202 provides that:

> Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

The *mens rea* of kidnapping, although subject to dispute, is commonly thought to be an intent to move or to confine the victim without his or her consent. The Wisconsin Statute section 940.31 provides that kidnapping is the carrying of another from one place to another without his or her consent and with the "intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will." Some statutes require holding an individual for a specific purpose such as detaining a person for ransom or as a hostage. Florida requires a specific intent, whether to hold an individual for ransom or reward, to serve as a shield or hostage, to inflict bodily harm, to terrorize the victim, or to interfere with the performance of any governmental or political function.[75] Texas considers the intentional or knowing abduction of another person with the intent to commit these acts as "aggravated kidnapping."[76]

Criminal Act

The essence of kidnapping is the *actus reus* of the forcible movement of a person as provided under the North Carolina statute "from one place to another."[77] The central issue is the extent of the movement required. The traditional rule in American law is that any movement, no matter how limited, is sufficient. In the well-known California case of *People v. Chessman,* Caryl Chessman was convicted of kidnapping when he forced a rape victim to move twenty-two feet into his car. The California Supreme Court noted that it is "the fact, not the distance of forcible removal which constitutes kidnapping in this State."[78]

Most courts abandoned this approach after realizing that almost any rape, battery, or robbery involves some movement of a victim. This led to prosecutors charging defendants with the primary crime as well as kidnapping and resulted in life imprisonment for crimes that otherwise did not merit this harsh penalty. In 1969, the California Supreme Court rejected the *Chessman* standard in *People v. Daniels*. The defendants entered the victims' apartments and forced them at knifepoint to move a few feet into another room where they were robbed and raped. The court reversed the kidnapping convictions on the grounds that the victims' movements were a central step in the rape or robbery and should not be considered as constituting the independent offense of kidnapping.[79]

Courts now generally limit the application of kidnapping statutes to "true kidnapping situations and [do] not . . . apply it to crimes which are essentially robbery, rape or assault . . . in which some confinement or asportation occurs as a subsidiary incident."[80] In other words, kidnapping statutes are no longer thought to include unlawful confinements or movements incidental to the commission of other felonies. Under this standard, courts require that for a movement to be considered kidnapping that it "must be more than slight, inconsequential, or an incident inherent in the crime." Judges have ruled that for the movement to constitute kidnapping, it must meaningfully contribute to the commission of the primary crime by preventing the victim from calling for help, reducing the defendant's risk of detection, facilitating escape, or increasing the danger to the victim.[81]

The movement or detention of the victim must be unlawful, meaning without the victim's consent by force or threat of force. The Wisconsin statute requires that the movement of an individual must be undertaken "without his or her consent" and by "force or threat of imminent force."[82] This excludes movements undertaken as a result of a lawful arrest, court order, or consent. An Arkansas court held that where the victim voluntarily accepted the defendant's offer of a ride to a friend's house, the victim revoked her consent when the perpetrator prevented her from leaving the automobile by displaying and threatening her with a firearm, ordering her to place her hands under her thighs, and taking her to his home where she was raped.[83]

Courts are divided over whether an individual is "forcibly" moved where the defendant fraudulently misrepresents his or her intended destination. The California Supreme Court held that a victim's movement was "accomplished by force or any other means of instilling fear" where a rapist falsely represented that he was a police officer and informed the eighteen-year-old victim that she faced arrest unless she accompanied him to a store from which she was suspected of having stolen merchandise. The court concluded that this "kind of compulsion is qualitatively different than if defendant had offered to give Alesandria [the victim] a ride, or sought her assistance in locating a lost puppy, or any other circumstance suggesting voluntariness on the part of the victim."[84]

Some states follow the Model Penal Code in reducing the seriousness of the kidnapping where the victim was "voluntarily released . . . in a safe place." This provides an incentive for a defendant to limit the harm inflicted on victims.[85]

In the next case, *People v. Aguilar,* the California court must decide whether the defendant's movement is sufficient to constitute kidnapping.

Model Penal Code

Section 212.1. Kidnapping

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

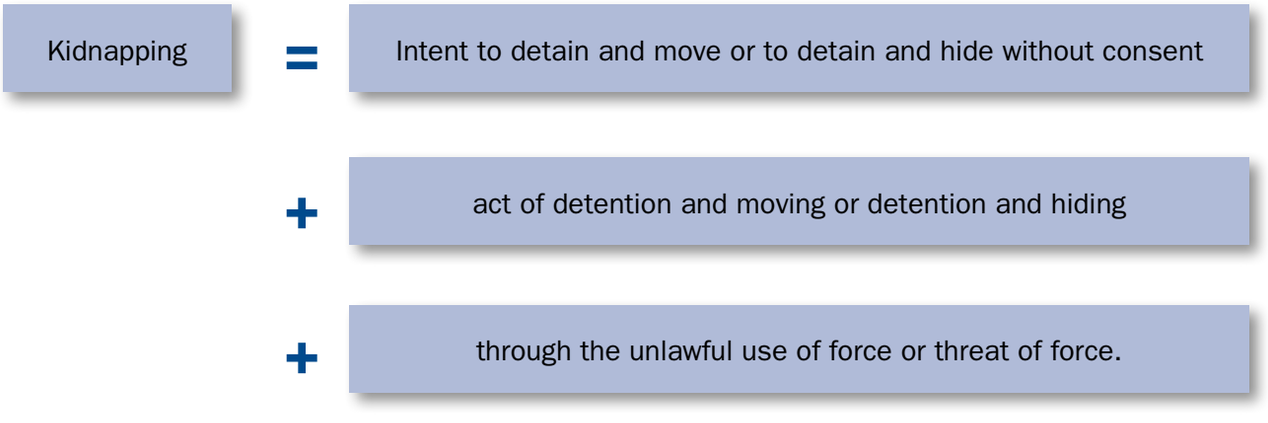
(d) to interfere with the performance of any governmental or political function.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to the trial, in which case it is a felony of the second degree (ten years). A removal or confinement is unlawful . . . if it is accomplished by force, threat, or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian, or other person responsible for general supervision of his welfare.

Analysis

1. Kidnapping is defined to include any of three acts. First, removing a victim from the protection of the home or business is intended to punish the taking of individuals from the safety and security of a home or business and placing them in danger. Second, removing individuals "a substantial distance from the vicinity" from where they are located. This is intended to ensure that punishment is not imposed for "trivial changes of location." Third, confining an individual for a substantial period of time in an isolated location with a specified intent. This is intended to punish the "frightening and dangerous" removal of a victim from a safe environment to an "isolated" location where he or she is outside the protection of the law. No movement or asportation is required in regard to confining an individual. The requirement that the detention is for a "substantial period of time" in a "place of isolation" is intended to avoid punishing a defendant for a detention that is merely incidental to a rape or other crime of violence.
2. Kidnapping is defined to require one of four specified purposes that commonly appear in kidnapping statutes.
3. An unlawful removal must be accomplished through force, threat, or deception or in the case of an "incompetent" juvenile under the age of fourteen, without the consent of a parent or guardian.
4. The reduction in punishment for kidnapping to a second-degree felony where the perpetrator releases the victim "alive and in a safe place" provides an incentive for the kidnapper to abandon the criminal enterprise. The defendant would remain liable for any battery or sexual assault.

The Legal Equation



Did Aguilar's movement of the victim constitute kidnapping?

People v. Aguilar, *16 CAL. RPTR. 3D 231 (CAL. CT. APP. 2004), Opinion by: Gilbert, J.*

Sergio Barrera Aguilar appeals a judgment after conviction of kidnapping to commit rape and sexual penetration, with a finding that he used a deadly weapon among other things.

The jury made additional special findings of fact that Aguilar personally used a knife, that he inflicted great bodily injury, and that "the movement of the victim in the course of the kidnapping substantially increased the risk of harm to her."

We conclude, among other things, substantial evidence supports: 1) the conviction for aggravated kidnapping, and 2) the finding that Aguilar substantially increased the victim's risk of harm by moving her.

Facts

Aguilar followed Nancy C., age 16, as she walked her dog down a residential street at night. He grabbed her and said "he was going to take [her] somewhere and rape [her]." He inserted his fingers in her vagina and she screamed. He then removed his hands from her vagina and pulled her 133 feet down the sidewalk past a house with a lit porch light to an area in front of a house with no light. He pushed her face down onto the hood of a car, "put his hands down [her] pants" and inserted his fingers in her vagina.

Police Officer James Ella testified that the area to which Nancy C. was moved was "extremely dark." Trees blocked "most of the illumination" coming from the light down the street. In a videotaped confession, Aguilar admitted he had grabbed Nancy C., was aroused, and put his fingers in her vagina. He said he moved "to a place where nobody could see [them]" to have intercourse with her. He admitted that what he did was "wrong" and that Nancy C. did not consent to have sex with him. He said he had a knife with him, but he "didn't pull the knife out."

Martin Molina, a nearby resident, testified that his porch light was the "only light on the street" between the area where Aguilar first grabbed Nancy C. and the location to which she was ultimately dragged. He said the first area was lighter because trees and bushes "[funnel] the light" from his porch light to that area. They deflect light away from the area where the attack ended.

Anthony Ventura Castillo was at home when he heard a woman screaming "help, help" and "save me." He testified it was so dark he had to turn on the porch light to see what was happening. He saw Aguilar throw Nancy C. to the ground and grab her by the neck. Aguilar was holding a knife "12 or 13 inches from her neck." Castillo told him to release her. Aguilar "got up and ran." Castillo and his brother chased Aguilar and apprehended him.

Issue

Aguilar contends the evidence is insufficient to support the aggravated kidnapping conviction.

"Kidnapping to commit rape involves two prongs. First, the defendant must move the victim and this asportation must not be 'merely incidental to the [rape].'… Second, movement must increase 'the risk of harm to the victim over and above that necessarily present in the [rape].'" . . . For aggravated kidnapping "' . . . there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong.' . . . Where movement changes the victim's environment, it does not have to be great in distance to be substantial. . . . [W]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." . . .

Aguilar contends that . . . he did not move Nancy C. into "a hidden location" such as a bathroom or a back room of a store. He says, "[t]he movement was down the sidewalk," an open area. But this distinction is not dispositive. Courts have held that moving a victim to a more isolated open area that is less visible to public view is sufficient. . . .

Reasoning

Here Aguilar forcibly moved Nancy C. 133 feet down a sidewalk at night, from an area illuminated by a porch light to an "extremely dark" area. The "risk to [Nancy C.] in the dark . . . increased significantly. . . ." Aguilar admitted his goal was to move her "to a place where nobody could see [them]." The movement "decreased [Aguilar's] likelihood of detection. . . ."

A reasonable trier of fact could infer this increased the risk to Nancy C. by making it harder for her to escape and "enhanced [Aguilar's] opportunity to commit additional crimes. . . . An increased risk of harm was manifested by appellant's demonstrated willingness to be violent. . . ." He pulled Nancy C. down the sidewalk, threw her to the ground, grabbed her neck, choked her, bit her, slammed her onto a car hood, held her face down and held a knife near her neck. He told Nancy C. that he was moving her to rape her which, when coupled with his violent acts, "pose[d] a substantial increase in the risk of psychological trauma . . . beyond that to be expected from a stationary" sexual attack.

Aguilar contends that he did not complete his goal because Castillo rescued Nancy C. But that "'does not . . . mean that the risk of harm was not increased [by the movement].'" We conclude the evidence was sufficient.

Holding

Aguilar creates a subjective "apparent purpose" test to determine whether his moving the victim was incidental. He argues his "apparent purpose" in moving the victim 133 feet was to commit the rape, and therefore the movement was "incidental" to the crime. The standard, however, is whether "the jury could reasonably have concluded that [the victim's] movement . . . was not merely

incidental" from the "totality of the circumstances. . . . [T]he defendant's intent to commit kidnapping as . . . a necessary component of the target offenses is not determinative of whether the movement is incidental." . . . The interpretation of "incidental" depends on the facts of the particular case. . . .

Questions for Discussion

1. Discuss the legal test for kidnapping relied on by the court.
2. Why does Aguilar contend that this was not kidnapping? Is it significant that the victim was moved only a short distance? What does the court conclude?
3. Do you agree with the court's conclusion that the victim was kidnapped?

You Decide

10.4 Twelve-year-old Amanda and thirteen-year-old Carolyn were in the kitchen of Amanda's house when an intruder, Greg Goodhue, entered through the back door. He ordered Carolyn into the adjoining bathroom, threw her onto the floor, jumped on top of her and attempted to place his hands down her pants. Amanda followed the two into the bathroom and began throwing objects at the defendant. Goodhue then got up and pushed Amanda away. He then shoved Carolyn back onto the floor, ripped her blouse and unbuttoned and unzipped her pants and began to remove them. The back door slammed, and Goodhue got off Carolyn and fled. The entire incident lasted from three to five minutes. Goodhue was convicted of attempted sexual assault, burglary, and kidnapping. He was sentenced to five to ten years for attempted sexual assault, five to ten years for burglary, and ten to fifteen years for kidnapping, all of which were to be served concurrently. Was Carolyn kidnapped? See *State v. Goodhue*, 833 A.2d 861 (Vt. 2003).

You can find the answer at www.sagepub.com/lippmanccl2e

False Imprisonment

Within the common law and in state statutes, **false imprisonment** is defined as the intentional and unlawful confinement or restraint of another person. The Idaho statute simply states that false imprisonment is the "unlawful violation of the personal liberty of another."[86] False imprisonment is generally considered a misdemeanor, punishable in Idaho by a fine not exceeding $5,000 or by imprisonment in the county jail for no more than one year or both.[87]

As with kidnapping, false imprisonment is a crime that punishes interference with the freedom and liberty of the individual.

False imprisonment requires an intent to restrain the victim. Arkansas and other states follow the Model Penal Code and provide that false imprisonment may be committed by an individual who "without consent and without lawful authority . . . knowingly restrains another person so as to interfere with his liberty."[88] The detention must be unlawful and without the victim's consent. A restraint by an officer acting in accordance with the law or by a parent disciplining his or her child does not constitute false imprisonment. The consent of the victim constitutes a defense to false imprisonment. A farmer who secured his wife with a chain while he went to town was not held liable for false imprisonment where the evidence indicated that she requested him to manacle her to the bed.[89]

The *actus reus* is typically described as compelling the victim to "remain where he did not want to remain or go where he did not want to go."[90] The confinement may be accomplished by physical restraint or by a threat of force of which the victim is aware. Confinement may also be achieved without force or the threat of force when, for instance, the perpetrator locks a door. Professors Perkins and Boyce point out that an individual is not confined because he is prevented from moving in one or in several directions so long as he may proceed in another direction. An individual may also be confined in a moving bus or in a hijacked airplane.[91]

False imprisonment may overlap with kidnapping or with assault and battery or robbery, and several states have eliminated the crime. In these states, people who are unlawfully detained are able to seek damages in civil court. The major difference between the crimes of kidnapping and false imprisonment is that false imprisonment does not require an asportation (movement). In addition, kidnapping statutes that punish the confinement as well as the movement of a victim often provide that the victim must be "secretly confined" or "held in isolation" for a specific purpose (e.g., to obtain a ransom). The Model Penal Code provides that the confinement for kidnapping must be for a "substantial period."[92] False imprisonment, in contrast, requires a detention that may take place in public or in the privacy of a home and may be for a brief or lengthy period. States such as Alabama

provide for the punishment of aggravated false imprisonment where an individual "restrains another person under circumstances which expose the latter to a risk of serious physical injury."[93]

Juries, at times, are asked to determine whether a defendant should be convicted of false imprisonment or kidnapping. In the Georgia case of *Shue v. State,* James Shue attacked and threatened to kill Elizabeth Guthrie unless she got into her car. Guthrie testified that as Shue pushed her into the car, she tightly grabbed the steering wheel and honked the horn. Shue cursed and walked away. The police report indicated that Guthrie voluntarily entered her car after Shue fled. Shue subsequently was acquitted of kidnapping, but convicted of false imprisonment.

The Georgia statute states that false imprisonment is committed by an "arrest, confinement or detention of the person, without legal authority, which violates the person's personal liberty." A kidnapping occurs when an individual "abducts or steals away any person without lawful authority or warrant and holds such person against his will." The Georgia appellate court noted that the "only difference between false imprisonment and kidnapping is that kidnapping requires asportation." The court ruled that the "jury could have believed Guthrie's testimony that Shue held her against her will but discounted her testimony that he pushed her into the car. Thus, the jury could have found that Guthrie was detained without having been carried away and therefore falsely imprisoned but not kidnapped."[94]

In another example, a North Carolina appellate court affirmed the conviction of Richard Overton for second-degree kidnapping of Elsie Fennell for the purpose of terrorizing her, a purpose that is prohibited under the North Carolina kidnapping statute. Overton beat and punched Fennell, with whom he was living, after she told him that he would have to move out if he did not start paying the bills. Overton "caught and restrained" Fennell from leaving the house and only gave her the keys to the car after she persuaded him that she would not call the police. Overton appealed on the grounds that he should have been convicted of false imprisonment rather than for kidnapping because he had confined and restrained Fennell for the purpose of avoiding detection by the police rather than for the purpose of terrorizing her. The North Carolina court recognized that "if the purpose of the restraint was to accomplish one of the purposes . . . in the kidnapping statute . . . the offense is kidnapping. In the absence of one of the statutorily specified purposes, the unlawful restraint is false imprisonment." The court affirmed Overton's conviction based on the fact that "it is immaterial that defendant's purpose may have changed during the course of the restraint."[95]

A contemporary application of false imprisonment is the United States Victims of Trafficking and Violence Protection Act of 2000 that punishes acts of slavery and forced labor. In *United States v. Bradley,* two New Hampshire defendants were convicted of misrepresenting the working conditions of their tree removal company to workers recruited from Jamaica who were threatened, forcibly detained, and abused when they attempted to return home.[96]

Model Penal Code

Section 212.3. False Imprisonment

A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

Section 212.2. Felonious Restraint

A person commits a felony of the third degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

Analysis

1. The Model Penal Code requires a substantial interference with an individual's liberty. This eliminates prosecutions for relatively modest interference with an individual's liberty.
2. An individual must knowingly restrain another person. As a result, it is sufficient that a defendant is aware that his or her conduct will result in the detention of another individual.
3. Felonious restraint is intended to punish as felonies restraints that create a risk of serious bodily injury or involuntary servitude.

The Legal Equation

False imprisonment = Restrain by + force, threat of force, or constructive force.

Cole v. State presents the distinction between kidnapping and false imprisonment. Can you explain why Cole was convicted of false imprisonment rather than of kidnapping?

Should the defendant have been convicted of kidnapping or of false imprisonment?

Cole v. State, *942 So. 2d 1010 (Fla. Dist. Ct. App. 2006), Opinion by: Stringer, J.*

Issue

Armistar Cole appeals his convictions and sentences for armed robbery and armed kidnapping. . . . Was . . . the evidence presented at trial . . . legally sufficient to sustain the conviction for armed kidnapping?

Facts

At trial, the evidence showed that the victim and her husband owned a Dollar Store, which Cole had patronized on several occasions. On July 8, 2003, the victim was working in the store when Cole came in to buy some candy. Cole approached the cash register and put money on the counter. When the victim opened the cash register to make change, Cole jumped over the counter and grabbed her by the neck. After a brief struggle, Cole pulled out a handgun. While holding the gun, he took money from the cash register, the victim's purse, which had been behind the counter, and a DVD player. He also forced the victim to open a file cabinet that was behind the counter, apparently thinking it might contain additional cash. After finding no money in the file cabinet, Cole pointed the gun at the victim and told her to "get in the bathroom and to stay there."

The victim walked approximately ten feet to the bathroom and closed the door. Cole did not lock the victim in the bathroom and did not block the door. Two to three minutes later, the victim heard a chime that indicated the front door had been opened. At that point, she opened the bathroom door and found that Cole was gone. She then immediately called the police.

At the close of the State's case, Cole moved for a judgment of acquittal on the kidnapping count, arguing the State had failed to prove a . . . case of kidnapping because the distance from the cash register to the counter was short and the victim was not locked in the bathroom. The trial court denied the motion. After the jury convicted Cole on the kidnapping charge, Cole filed a motion for new trial arguing that the evidence on that charge was legally insufficient because "the victim was ordered into the bathroom only a few feet away, and was not confined by [Cole]." The trial court denied that motion as well. Cole now raises the same issue in this appeal.

Reasoning

Section 787.01(1)(a), Florida Statutes (2003), defines the term "kidnapping" as:

> forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
>
> . . .
>
> (2) Commit or facilitate commission of any felony.

While this statutory definition appears straightforward, the Florida Supreme Court has recognized that "a literal interpretation of subsection 787.01(1)(a)2 would result in a kidnapping conviction for 'any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery.'" . . . Thus, to limit the reach of the kidnapping statute, the supreme court adopted a three-part test in *Faison v. State,* 426 So. 2d 963 (Fla. 1983). Under the *Faison* test, if a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

(a) Must not be slight, inconsequential and merely incidental to the other crime;

(b) Must not be of the kind inherent in the nature of the other crime; and

(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

In applying the elements of the *Faison* test, Florida courts have repeatedly held that simply moving a robbery victim at gunpoint from one room to another, even if a door is closed and the victim is ordered not to come out, is insufficient as a matter of law to sustain a conviction for kidnapping. In reaching this conclusion, the courts have determined that such movement is likely to be involved in any robbery, and there can be no kidnapping when "the only confinement involved is the sort that, though not necessary to the underlying felony, is likely to naturally accompany it." Thus, for example, in *Friend v. State,* the defendant, while carrying a firearm during the robbery of an office building, ordered three employees into a bathroom and commanded them to "stay there." Although the bathroom door was shut during the robbery, the employees opened the door within five minutes and discovered that the defendant had departed. The court reversed the kidnapping convictions, holding that this evidence was legally insufficient to support a kidnapping conviction because the confinement was of minimal duration and was inherent in the nature of the robbery.

Similarly, in *Frederick v. State,* one robber ordered the restaurant manager to open the safe while another robber ordered two employees at gunpoint to walk into a freezer. The two employees did so and were told to stay there. The robber then closed the door to the freezer. After the robbers left, the manager told the employees they could come out, and they did so. In reversing the kidnapping convictions arising from the "confinement" of the two employees, the court stated:

> In essence, the state's evidence in support of the kidnapping charges in this case consisted of the fact that the perpetrator ordered two restaurant employees to go into the freezer, closed the door behind them, and told them to remain in there. This evidence is insufficient, as a matter of law, to sustain the kidnapping convictions.

The evidence in this case, like the evidence in *Frederick* and *Friend,* is insufficient as a matter of law to support the kidnapping conviction against Cole. The movement of the victim in this case was of minimal duration and occurred at the very end of the robbery. It was the type of movement that was likely to naturally accompany a robbery, and the "confinement" ceased naturally with the robbery. Thus, the State's evidence was legally insufficient to support the kidnapping charge.

That said, however, the evidence presented was sufficient to support a conviction for false imprisonment. Florida Statutes section 787.02(1)(a) defines false imprisonment as "forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will." The *Faison* test does not apply to the offense of false imprisonment. Here, the evidence did establish that Cole restrained the victim against her will by forcing her at gunpoint into the bathroom. This evidence is sufficient to support a conviction for false imprisonment with a firearm. *See, e.g., Sanders v. State* (reversing kidnapping conviction and remanding for entry of judgment for lesser offense of false imprisonment when evidence showed that victim was confined inside her apartment for three hours during sexual battery); *Gray v. State* (reversing kidnapping conviction and remanding for trial court to enter judgment for false imprisonment based on evidence that the robber dragged store clerk throughout the store during robbery but never bound her or otherwise confined her); *Davis v. State* (affirming conviction for false imprisonment based on evidence that victim was restrained on sofa by defendant holding a gun on her and telling her to "shut up").

Holding

Accordingly, we reverse Cole's conviction for armed kidnapping and remand with directions to the trial court to enter a judgment for false imprisonment with a firearm and to resentence Cole accordingly.

Questions for Discussion

1. Explain why the appellate court reversed Cole's conviction for armed kidnapping and directed the trial court to enter a judgment for false imprisonment.
2. What facts support Cole's conviction for false imprisonment?
3. Would Cole have been convicted for kidnapping had he locked the bathroom door? Can you think of any arguments that the prosecutor might have made to the appellate court to support the argument that Cole was justifiably convicted of kidnapping?

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

There are four categories of offenses against the person: sexual offenses, bodily injury and interference, freedom of movement, and homicide. We will explore homicide in the next chapter.

The most serious sexual offense is rape. Rape at common law was punishable by death, and only homicide was historically considered a more severe crime. Common law rape required the intentional vaginal intercourse by a man of a woman who was not his wife by force or threat of serious bodily injury against her will. The fear of false conviction led to the imposition of various barriers that the victim was required to overcome. This included immediate complaint, corroboration, the admissibility of evidence pertaining to a victim's past sexual activity, and a cautionary judicial instruction. The focus was on the victim, who was expected to demonstrate her lack of consent by the utmost resistance.

The law of sexual offenses was substantially modified by the legal reforms of the 1970s and 1980s that treated rape as an assault against the person rather than as an offense against sexual morality. Sexual intercourse was expanded to include the forced intrusion into any part of another person's body, including the insertion of an object into the genital or anal opening. Rape was defined in gender-neutral terms, the marital exemption was abolished, and rape was divided into simple and aggravated rape based on the type of the penetration, use of force, or resulting physical injury. Various statutes no longer employ the term rape and consider vaginal intercourse merely to be another form of sexual assault.

The intent of rape reform is to shift attention from resistance by the victim to the force exerted by the perpetrator. There are two approaches to analyzing force. The extrinsic force standard requires an act of force beyond the physical effort required to achieve sexual penetration. The intrinsic force standard requires only that amount of force required to achieve penetration. Rape may also be accomplished by threat of force, through penetration obtained by fraud, or when the victim is incapable of consent stemming from unconsciousness, sleep, or insanity.

The *mens rea* of rape at common law was the intent to engage in vaginal intercourse with a woman whom the defendant knew was not his wife through force or the threat of force against her will. There was no clear guidance as to whether a defendant was required to know that the intercourse was without the female's consent. A majority of states now accept an objective test that recognizes the defense that a defendant honestly and reasonably believed that the victim consented. This requires equivocal conduct by the victim that is capable of being reasonably, but mistakenly, interpreted by the assailant as indicating consent. The English House of Lords rule, in contrast, adopts a subjective approach and examines whether a defendant "knows" whether the victim consented. The third approach is the imposition of strict liability that holds defendants guilty whatever their personal belief or the objective reasonableness of their belief.

Recent legal and statutory developments recognize that individuals may withdraw their consent. The continuation of sexual relations under such circumstances constitutes rape.

Statutory rape is a strict liability offense that holds a defendant guilty of rape based on his intercourse with an "underage" female. Several states permit the defense of a reasonable mistake of age. Rape shield laws prohibit the prosecution from asking the victim about or introducing evidence concerning sexual relations with individuals other than the accused or introducing evidence relevant to the victim's reputation for chastity.

Assault and battery, although often referred to as a single crime, are separate offenses. A battery is the application of force to another person. An assault may be committed by attempting to commit a battery or by intentionally placing another in imminent fear of a battery. Aggravated assaults and batteries are felonies.

Kidnapping is the unlawful and forcible seizure and asportation (carrying away) of another without his or her consent. This requires the specific intent to move the victim without his or her consent. The *actus reus* is the moving or detention of the victim. Courts differ on the extent of this movement, variously requiring slight or, under the Model Code standard, substantial movement. The majority rule is that the movement must not be incidental to the commission of another felony and must contribute to the primary crime by preventing the victim from calling for help, reducing the defendant's risk of detection, facilitating escape, or increasing the danger to the accused.

False imprisonment is the intentional and unlawful confinement or restraint of another person. The restraint may be achieved by force, threat of force, or by other means and does not require the victim's asportation or secret confinement. False imprisonment is a misdemeanor other than when committed in an aggravated fashion.

Chapter Review Questions

1. What was the original justification for the crime of rape?
2. Why does "date rape" present a challenge to prosecutors?
3. How did the common law define rape? List some of the barriers to establishing rape under the common law.
4. Describe the changes in the law of rape introduced by the reform statutes of the 1970s and 1980s.
5. What elements distinguish a simple or second-degree rape from aggravated or first-degree rape?

6. Distinguish the standard of extrinsic force from the intrinsic force standard in the law of rape.
7. In addition to force, what other means might a perpetrator employ to satisfy the *actus reus* requirement in the law of rape?
8. What are the three approaches to the defense of mistake of fact in the *mens rea* of rape?
9. Is a defendant's belief that another individual is above the age of lawful consent a defense to statutory rape? What of the female's past sexual experience?
10. May an individual who withdraws consent claim to be the victim of rape?
11. What is the purpose of rape shield laws? Are there exceptions to rape shield laws?
12. Distinguish an assault from a battery.
13. What are the requirements of a battery? Describe the difference between a simple and an aggravated battery.
14. Discuss the two ways to commit an assault.
15. What is the relationship between the crime of stalking and a criminal assault?
16. What is the definition of kidnapping? What are the various approaches to the asportation requirement?
17. Distinguish between false imprisonment and kidnapping.

Legal Terminology

acquaintance rape
aggravated rape
assault and battery
corroboration
cyberstalking
earnest resistance
extrinsic force
false imprisonment
fraud in inducement
fraud in the *factum*
intrinsic force
kidnapping
mayhem
prompt complaint
prosecutrix
rape shield laws
rape trauma syndrome
reasonable resistance
resist to the utmost
stalking
statutory rape
withdrawal of consent

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read about rape in male prisons.
2. Learn more about stalking.
3. Examine human sexual trafficking and sexual slavery in the United States.
4. Read more about the Kobe Bryant rape prosecution.

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11 Homicide

Was Karen killed with extreme and outrageous depravity?

Karen Slattery was stabbed or cut eighteen times. She was alive when all the wounds were inflicted. She was in terror. She undoubtedly had a belief of her impending doom. Her fear and heightened level of anxiety occurred over a period of time. Most important, the defendant told Dr. McKinley Cheshire that fear in his victim was necessary. The defendant stated that causing deliberate pain and fear would increase the flow of female bodily fluids which he needed for himself. The puncturing of Karen Slattery's lung caused her to literally drown in her own blood. She experienced air deprivation. Each of the eighteen cuts, slashes, and/or stab wounds caused pain by penetrating nerve endings in Miss Slattery's body. The crime of murdering Miss Slattery evidenced extreme and outrageous depravity.

Core Concepts and Summary Statements

Introduction

Homicide is the most serious criminal offense. The common law gradually distinguished between murder, a killing committed with malice aforethought, and manslaughter.

Types of Criminal Homicide

Homicide is divided into various degrees that reflect the seriousness of the offense.

Actus Reus and Criminal Homicide

Homicide entails the killing of a human being or causing the death of a human being.

The Beginning of Human Life

Life begins with the viability of the fetus.

The End of Human Life

Death is measured by the "brain death test." This involves an absence of brain activity.

Mens Rea and Criminal Homicide

The assignment of degrees to homicide is based on a defendant's criminal intent.

Murder

A. First-degree murder involves the intentional and premeditated taking of the life of another with malice aforethought.
B. Capital and aggravated homicide is a killing committed in a heinous, atrocious, and cruel fashion. Conviction results in capital punishment or in life imprisonment. States that do not recognize the death penalty punish these killings by life imprisonment.
C. Second-degree murder is the intentional taking of the life of another with malice aforethought.
D. Depraved heart murder is killing with extreme recklessness with malice aforethought.
E. Felony murder is a killing committed during a designated felony with malice aforethought.
F. A corporation may be held liable for murder committed or approved by corporate managers or officials in the course of their employment.

Voluntary Manslaughter

Voluntary manslaughter is killing of another in the heat of passion without malice aforethought in reaction to adequate provocation.

Involuntary Manslaughter

A. Involuntary manslaughter is the killing of another as a result of a negligent or reckless act during the commission of an unlawful act.
B. Negligent manslaughter involves an act that an individual is unaware of that creates a high degree of risk of human injury or death under circumstances in which a reasonable person would have been aware of the risk.
C. Misdemeanor manslaughter involves an unintentional killing that results from an unlawful act not amounting to a felony.

Introduction

Why is homicide considered the most serious criminal offense? What is the reason that it is the only crime subject to the death penalty?

Supreme Court Justice William Brennan noted that in a society that "so strongly affirms the sanctity of life," it is not surprising that death is viewed as the "ultimate" harm. Justice Brennan went on to observe that death is "truly awesome" and is "unusual in its pain, in its finality, and in its enormity. . . . Death, in these respects, is in a class by itself. . . . [It is] degrading to human dignity. It is this regard for life that reminds us to respect one another and to treat each individual with dignity and regard."[1] In *Coker v. Georgia,* Supreme Court Justice Byron White, in explaining why the death penalty is imposed for murder while it is not imposed for rape, noted that the "murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."[2]

There are also religious grounds for treating murder as the most serious of crimes. The influential eighteenth-century English jurist William Blackstone observed that murder is a denial of human life and that human life is a gift from God. He stressed that a mere mortal has no right to take a life and to disrupt the divine order of the universe. Professor George Fletcher expands on this notion and explains that in the view of the Bible, a killer was thought to acquire control over the blood of the victim. The execution of the killer was the only way that the blood could be returned to God.[3]

At common law, murder was defined as the unlawful killing of another human being with malice aforethought (we will discuss the meaning of malice aforethought in the next section). Initially the common law did not distinguish between types of **criminal homicide**. The taking of a life was treated equally as serious whether committed intentionally, in the heat of passion, recklessly, or negligently.

The development of the modern law of homicide can be traced to fifteenth-century England. Members of the clergy were prosecuted for homicide before ecclesiastical or religious courts that, unlike royal courts, were not authorized to impose the death penalty. Offenders, instead, were subject to imprisonment for a year, the branding of the thumb, and the forfeiture of goods. Judges in the religious courts gradually expanded the *benefit of clergy* to any individual who could read, in order to avoid the harshness of the death penalty. Defendants who could not read typically claimed the benefit of clergy by memorizing passages from the Bible in order to prove that they were literate.

The English monarchy resisted expanding the power of religious courts and enacted a series of statutes that established the jurisdiction of royal courts over the most atrocious homicides. These statutes denied the benefit of clergy and provided for the death penalty. The royal courts began to distinguish between murder, which was committed with malice aforethought and was not eligible for the benefit of clergy, and manslaughter, which was committed without malice aforethought and was eligible for the benefit of clergy. This distinction persisted even after royal courts asserted jurisdiction over all homicides. Murder under the royal courts was subject to the death penalty unless a royal pardon was issued, whereas manslaughter was viewed as a less serious offense that did not result in capital punishment. Most state statutes continue to recognize the distinction between murder and manslaughter. Over time, judges created several other categories of homicide, a process that culminated in modern homicide statutes.

In this chapter, we will review the distinction between these various grades of criminal homicide. Your challenge is to understand the distinctions between these various types of criminal homicide.

Types of Criminal Homicide

By the eighteenth century, the law recognized four types of homicide:

- **Justifiable Homicide.** This includes self-defense, defense of others, defense of the home, and police use of deadly force.
- **Excusable Homicide.** Murder committed by individuals who are considered to be legally insane, by individuals with a diminished capacity, or by infants.

- **Murder.** All homicides that are neither excused nor justified.
- **Manslaughter.** All homicides without malice aforethought that are committed without justification or excuse.

As we have seen, by the end of the fifteenth century criminal homicide had been divided into murder, or the taking of the life of another with malice aforethought, and manslaughter, or the taking of the life of another without malice aforethought. **Malice aforethought** is commonly defined as an intent to kill with an ill will or hatred. Aforethought requires that the intent to kill is undertaken with a design to kill. The classic example of a plan to kill is murder committed while "lying in wait" for the victim.[4]

The commentary to the Model Penal Code notes that judges gradually expanded malice aforethought to include various types of murder that have little relationship to the original definition. As observed by the Royal Commission on Capital Punishment in England, malice aforethought has come to be a general name for "a number of different mental attitudes which have been variously defined at different stages in the development of the law, the presence of any one of which has been held by the courts to render a homicide particularly heinous and therefore to make it murder."[5]

The Model Penal Code notes that as the common law developed, malice aforethought came to be divided into several different mental states, each of which was subject to the penalty of death. The first is intent to kill or murder. A second category of murder entails knowingly causing grievous or serious bodily harm. A third category of murder is termed **depraved heart murder** or killing committed with extreme recklessness or negligence. This involves a "depraved mind" or an "abandoned and malignant heart" and entails a wanton and willful disregard of an unreasonable human risk. A fourth category involves an intent to resist a lawful arrest. There is one additional category of murder committed with malice aforethought. This is murder committed during a felony, which today is termed **felony murder**.

Remember that murder requires a demonstration of malice. The Nevada criminal code states that murder is the "unlawful killing of a human being, with malice aforethought, either express or implied. . . . The unlawful killing may be effected by any of the various means by which death may be occasioned."[6] Individuals who have a deliberate intent to kill possess *express malice*. An *implied malice* exists in those cases that an individual possesses an intent to cause great bodily harm or the intent to commit an act that may be expected to lead to death or great bodily harm. Nevada defines express malice as a "deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances." The Nevada law goes on to provide that malice may be implied "when all the circumstances of the killing show an abandoned and malignant heart."[7]

What about manslaughter? The common law of manslaughter developed into two separate categories. The first entails an intentional killing committed without malice in the heat of passion upon adequate provocation. Murder was also considered manslaughter when it was committed without malice as a result of conduct that was insufficiently reckless or negligent to be categorized as depraved heart murder. Courts typically describe the first category as **voluntary manslaughter** and the second as **involuntary manslaughter**.

In 1794, Pennsylvania adopted a statute creating separate grades of murder and manslaughter that continue to serve as the foundation for a majority of state statutes today. The Pennsylvania statute divided homicide into two separate categories and limited the death penalty to first-degree murder, the most serious form of homicide. Second-degree murder was punishable by life imprisonment.

> All murder, which shall be perpetrated by means of poison, by lying in wait, or by any other kind of willful, deliberate, or premeditated killing or which shall be committed in perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.[8]

Modern state statutes typically divide murder into first- and second-degree murder, both of which require the prosecutor to establish intent and malice. **First-degree murder** is the most serious form of murder, and the prosecutor has the burden of establishing **premeditation and deliberation**. This involves demonstrating that the defendant reflected for at least a brief period of time before intentionally killing another individual. **Second-degree murder** usually includes all murders not involving premeditation and deliberation. Manslaughter typically comprises an additional grade or grades of homicide. These general categories are described in the following list, starting with the most serious degree of homicide. Keep in mind that state statutes differ widely in their approach to defining homicide.[9]

- *First-Degree Murder.* Premeditation and deliberation and murder committed in the perpetration of various dangerous felonies. Some statutes explicitly include the killing of a police officer and murder committed while lying in wait or as a result of torture or poison.
- *Second-Degree Murder.* Killing with malice and without premeditation. This may include a death resulting from an intent to cause serious bodily harm and reckless, depraved heart murders.
- *Voluntary Manslaughter.* Murder in the heat of passion.
- *Involuntary Manslaughter.* Gross negligence.

Some states also single out vehicular manslaughter as a special form of involuntary manslaughter.

Actus Reus and Criminal Homicide

State statutes define the actus reus of criminal homicide as the "unlawful killing of a human being" or "causing the death of a person." This may involve an infinite variety of acts, including shooting, stabbing, choking, poisoning, beating with a bat or axe, and "a thousand other forms of death."[10] Homicides can also be carried out without landing a single blow. A wife, for instance, was found to have engaged in a pattern of constant criticism and threats of violence against her husband, weakening him mentally and worsening his heart condition. He died after she coerced him into walking in the deep snow.[11] In another case, a husband was held criminally liable for the murder of his young wife when he threatened to beat her unless she jumped into a stream that subsequently carried her away in the current.[12]

There are two preliminary issues that we must address before examining the various grades of homicide. The first is at what point does life begin for purposes of homicide? This is important in determining whether an assailant can be held criminally liable for the death of a fetus. The question at the opposite end of the scale is at what point does life end? What if a grieving son and daughter "pull the plug" on a sick parent whose brain no longer functions and who is being kept artificially alive on a life support machine?

The Legal Equation

The Beginning of Human Life

We have seen that murder entails the killing of a human being. At what point does life begin? The common law rule adopted in 1348 provided that a defendant was not criminally responsible for the murder of a child in a mother's womb unless the child was born alive with the capacity for an independent existence. Following the child's birth, the question was whether the defendant's acts were the proximate cause of death. This rule reflected the fact that doctors were unable to determine whether an unborn child was alive in the mother's womb at the time of an attack.

The common law rule has been abandoned in most states in the last few decades in favor of a rule that imposes criminal liability when the prosecution is able to establish beyond a reasonable doubt that the fetus was viable, meaning that it was capable of living separate and apart from the mother. In *Commonwealth v. Cass,* in 1984, the Massachusetts Supreme Judicial Court ruled that the "infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide. . . . We believe that our criminal law should extend its protection to viable fetuses."[13]

Keep in mind that the U.S. Supreme Court recognized in *Roe v. Wade,* in 1973, that women have a right to an abortion as part of their constitutional right to privacy. A state may limit this

right during the last phase of pregnancy, other than in those instances where an abortion is necessary to protect the health or life of the mother. The decision to hold an attacker criminally responsible for the death of a viable fetus does not limit the right of a woman to voluntarily consent to an abortion by a licensed physician. The Model Penal Code maintains the common law "born alive" rule in order to avoid a possible conflict between the law of abortion and the criminal law rule concerning the fetus.[14]

In *People v. Davis,* the California Supreme Court considered whether to limit criminal liability for the murder of a fetus to viability or to extend criminal liability to the postembryonic stage of pregnancy, seven or eight weeks following fertilization.

Did Davis murder a nonviable fetus?

People v. Davis, *872 P.2D 591 (CAL. 1994), Opinion by: Lucas, C.J.*

California Penal Code (CPC) section 187, subdivision (a), provides that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." In this case, we consider and reject the argument that viability of a fetus is an element of fetal murder under the statute.

Facts

On March 1, 1991, Maria Flores, who was between twenty-three and twenty-five weeks pregnant, and her twenty-month-old son, Hector, went to a check-cashing store to cash her welfare check. As Flores left the store, defendant pulled a gun from the waistband of his pants and demanded the money ($378) in her purse. When she refused to hand over the purse, defendant shot her in the chest. Flores dropped Hector as she fell to the floor and defendant fled the scene.

Flores underwent surgery to save her life. Although doctors sutured small holes in the uterine wall to prevent further bleeding, no further obstetrical surgery was undertaken because of the immaturity of the fetus. The next day, the fetus was stillborn as a direct result of its mother's blood loss, low blood pressure and state of shock. Defendant was soon apprehended and charged with assaulting and robbing Flores, as well as murdering her fetus. The prosecution charged a special circumstance of robbery-murder.

At trial, the prosecution's medical experts testified the fetus's statistical chances of survival outside the womb were between seven and forty-seven percent. The defense medical expert testified it was "possible for the fetus to have survived, but its chances were only two or three percent." None of the medical experts testified that survival of the fetus was "probable."

Although CPC section 187, subdivision (a), does not expressly require a fetus be medically viable before the statute's provisions can be applied to a criminal defendant, the trial court followed several Court of Appeal decisions and instructed the jury that it must find the fetus was viable before it could find defendant guilty of murder under the statute. The trial court did not, however, give the standard viability instruction, CALJIC No. 8.10, which states: "A viable human fetus is one who has attained such form and development of organs as to be normally capable of living outside of the uterus." The jury, however, was given an instruction that allowed it to convict defendant of murder if it found the fetus had a possibility of survival: "A fetus is viable when it has achieved the capability for independent existence; that is, when it is possible for it to survive the trauma of birth, although with artificial medical aid."

The jury convicted defendant of murder of a fetus during the course of a robbery, assault with a firearm, and robbery. The jury found that, in the commission of each offense, defendant personally used a firearm. The jury found true the special circumstance allegation. Accordingly, because the prosecutor did not seek the death penalty, defendant was sentenced to life without possibility of parole, plus five years for the firearm use.

Issue

On appeal, defendant contended that the trial court prejudicially erred by not instructing the jury pursuant to CALJIC No. 8.10. . . . [D]efendant claimed, rather than defining viability as a "reasonable possibility of survival," the trial court should have instructed the jury under the higher "probability" threshold described in CALJIC No. 8.10.

The People argued that no viability instruction was necessary because prosecution under CPC section 187, subdivision (a), does not require that the fetus be viable. After reviewing the wording of section 187, subdivision (a), its legislative history, the treatment of the issue in other jurisdictions, and scholarly comment on the subject, the Court of Appeal agreed with the People that contrary to prior California decisions, fetal viability is not a required element of murder under the statute. . . .

As explained below, we agree with the People and the Court of Appeal that viability is not an element of

fetal murder under CPC section 187, subdivision (a), and conclude therefore that the statute does not require an instruction on viability as a prerequisite to a murder conviction. In addition, because every prior decision that had addressed the viability issue had determined that viability of the fetus was prerequisite to a murder conviction under section 187, subdivision (a), we also agree . . . that application of our construction of the statute to defendant would violate due process and ex post facto principles.

Reasoning

In 1970, CPC section 187, subdivision (a), provided: "Murder is the unlawful killing of a human being, with malice aforethought." In *Keeler v. Superior Court,* 470 P.2d 617 (Cal. 1970), a majority of the court held that a man who had killed a fetus carried by his estranged wife could not be prosecuted for murder because the Legislature (consistent with the common law view) probably intended the phrase "human being" to mean a person who had been born alive.

The Legislature reacted to the *Keeler* decision by amending the murder statute . . . CPC subdivision (a), to include within its proscription the killing of a fetus. The amended statute reads: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." The amended statute specifically provides that it does not apply to abortions complying with the Therapeutic Abortion Act, performed by a doctor when the death of the mother was substantially certain in the absence of an abortion, or whenever the mother solicited, aided, and otherwise chose to abort the fetus.

The legislative history of the amendment suggests the term "fetus" was deliberately left undefined after the Legislature debated whether to limit the scope of statutory application to a viable fetus. The Legislature was clearly aware that it could have limited the term "fetus" to "viable fetus," for it specifically rejected a proposed amendment that required the fetus be at least twenty weeks in gestation before the statute would apply.

In 1973, the United States Supreme Court issued a decision that balanced a mother's constitutional privacy interest in her body against a state's interest in protecting fetal life, and determined that in the context of a mother's abortion decision, the state had no legitimate interest in protecting a fetus until it reached the point of viability, or when it reached the "capability of meaningful life outside the mother's womb." *Roe v. Wade,* 410 U.S. 113 (1973). The court explained that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." At the point of viability, the court determined, the state may restrict abortion.

Thereafter . . . the Court of Appeal construed the term "fetus" in CPC section 187, subdivision (a), to mean a "viable fetus" as defined by *Roe v. Wade*. . . . Defendant asserts that section 187, subdivision (a), has no application to a fetus not meeting *Roe v. Wade*'s definition of viability. Essentially, defendant claims that because the fetus could have been legally aborted under *Roe v. Wade,* at the time it was killed, it did not attain the protection of section 187, subdivision (a) and he therefore cannot be prosecuted. . . .

But *Roe v. Wade* does not hold that the state has no legitimate interest in protecting the fetus until viability . . . . As observed by one commentator: . . . The *Roe* decision, therefore, forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent. The Court did not rule that the unborn's interests could not be recognized in situations where there was no conflict. Thus when the state's interest in protecting the life of a developing fetus is not counterbalanced against a mother's privacy right to an abortion or other equivalent interest, the state's interest should prevail.

We conclude, therefore, that when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide. Here, the Legislature determined that the offense of murder includes the murder of a fetus with malice aforethought. Legislative history suggests "fetus" was left undefined in the face of divided legislative views about its meaning. Generally, however, a fetus is defined as "the unborn offspring in the postembryonic period, after major structures have been outlined." This period occurs in humans "seven or eight weeks after fertilization" and is a determination to be made by the trier of fact. Thus, we agree with the above cited authority that the Legislature could criminalize murder of the postembryonic product without the imposition of a viability requirement. . . .

As the Court of Appeal below observed, the wording of CALJIC No. 8.10, defining viability as "normally capable of living outside of the uterus," while not a model of clarity, suggests a better than even chance—a probability—that a fetus will survive if born at that particular point in time. By contrast, the instruction given below suggests a "possibility" of survival, and essentially amounts to a finding that a fetus incapable of survival outside the womb for any discernible time would nonetheless be considered "viable" within the meaning of CPC section 187, subdivision (a). Because the instruction given by the trial court substantially lowered the viability threshold as commonly understood and accepted . . . we conclude that the trial court erred in instructing the jury pursuant to a modified version of CALJIC No. 8.10.

The question then is whether it is reasonably probable a result more favorable to defendant would have been reached absent the instructional error. The record shows the weight of the medical testimony was against the probability of the fetus being viable at the point it was killed. Defendant's medical expert opined that it was "possible" for the fetus to have survived the trauma of an early birth, but that its chances for survival were about two or three percent. . . . [N]one of the medical experts who testified at defendant's trial believed that the fetus

had a "probable" chance of survival. Accordingly, because the evidence on the issue of viability erroneously supported the concept of the "possibility" of survival, and the jury was then instructed that viability means "possible survival," the jury was misinformed that it could find the fetus was viable before it "attained such form and development of organs as to be normally capable of living outside the uterus." Had the jury been given CALJIC No. 8.10, it is reasonably probable it would have found the fetus not viable. We conclude, therefore, that defendant was prejudiced by the instructional error and the conviction of fetal murder must be reversed.

Holding

We conclude that viability is not an element of fetal homicide under CPC section 187, subdivision (a). The third-party killing of a fetus with malice aforethought is murder under section 187, subdivision (a), as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.

We also conclude that our holding should not apply to defendant and that the trial court committed prejudicial error by instructing the jury pursuant to a modified version of CALJIC No. 8.10. We therefore affirm the judgment of the Court of Appeal.

Dissenting, *Mosk, J.*

I dissent. I believe the Legislature intended the term "fetus" in its 1970 amendment to California Penal Code section 187 to mean a viable fetus. . . . The statutory language in issue here—the 1970 amendment to CPC section 187 extending the crime of murder to the killing of "a fetus"—was itself enacted in direct and vigorous response to a judicial opinion (*Keeler*) with which the Legislature disagreed. If the Legislature had also disagreed a few years later with subsequent judicial opinions limiting the statutory prohibition against killing "a fetus" to the killing of a viable fetus, surely it would have spoken again, and equally vigorously. To this day, however, the Legislature has remained silent and taken no remedial action. In these circumstances its acquiescence is persuasive evidence of its intent. . . . .

Having erroneously concluded that the Legislature had no intent with respect to the meaning of the key word "fetus" in the 1970 amendment to CPC section 187, the lead opinion proceeds to legislate on the subject by supplying the assertedly missing definition: "[A] fetus," says the lead opinion, "is defined as 'the unborn offspring in the postembryonic period, after major structures have been outlined.' This period occurs in humans 'seven or eight weeks after fertilization.' . . ." The lead opinion repeats its new definition in concluding that the malicious killing of a fetus is murder under section 187 as long as the state can show the fetus has progressed "beyond the embryonic stage of seven to eight weeks." . . . [I]t is highly unlikely that such was the Legislature's intent.

Yet that is the least of the problems with the lead opinion's new definition of "fetus" in CPC section 187. Because liability after seven weeks necessarily includes liability after eight weeks, we may fairly assume that prosecutors faced with the lead opinion's imprecise definition will opt for the more inclusive figure and charge murder when the fetal death occurs at seven weeks. Do my colleagues have any idea what a seven-week-old product of conception looks like?

To begin with, it is tiny. At seven weeks its "crown-rump length"—the only dimension that can be accurately measured—is approximately 17 millimeters, or slightly over half an inch. It weighs approximately three grams, or about one-tenth of an ounce. In more familiar terms, it is roughly the size and weight of a peanut.

If this tiny creature is examined under a magnifying glass, moreover, its appearance remains less than human. Its bulbous head takes up almost half of its body and is bent sharply downward; its eye sockets are widely spaced; its pug-like nostrils open forward; its paddle-like hands and feet are still webbed; and it retains a vestigial tail . . . . And as concluded in the Comment relied on by the lead opinion, "A being so alien to what we know to be human beings seems hardly worth being made the subject of murder." . . .

The contrast between such a tiny, alien creature and the fully formed "5-pound, 18-inch, 34-week-old, living, viable child" in *Keeler* is too obvious to be ignored. I can believe that by enacting the 1970 amendment the Legislature intended to make it murder to kill a fully viable fetus like Teresa Keeler's baby. But I cannot believe the Legislature intended to make it murder—indeed, capital murder—to cause the death of an object the size of a peanut.

[U]nder the lead opinion's definition a person may be subject to a conviction of capital murder for causing the death of an object that was literally invisible to everyone, and hence that the person had no reason to know even existed. A woman whose reproductive system contains an immature fetus a fraction of an inch long and weighing a fraction of an ounce does not, of course, appear pregnant. In fact, if she is one of many women with some irregularity in her menstrual cycle, she herself may not know she is pregnant: "quickening" does not occur until two or three months later. Unless such a woman knows she is pregnant and has disclosed that fact to the defendant, the defendant has no way of knowing she is carrying a fetus.

Nor is this problem limited to fetuses that are "seven or eight" weeks old. Although the length of time that a woman can be pregnant without her condition's becoming noticeable varies according to such factors as her height and weight, the size of her fetus, and even the style of her clothing, the case at bar demonstrates that it can extend well into her pregnancy. Here Flores testified that in her opinion her pregnancy "showed" on the date of the shooting, March 1, 1991; but defendant testified to the contrary, and there was persuasive evidence to support him. . . . Thomas Moore, M.D., an experienced

perinatologist, testified that in his opinion it is "not likely" that on the date of the shooting a woman of Flores's stature would have showed her pregnancy when clothed and standing upright. . . .

Yet the expert testimony agreed that Flores was between twenty-three and twenty-five weeks'—approximately six months'—pregnant on the date of the shooting. This is the very threshold of viability: an expert witness reported on a recent study showing that at twenty-three weeks the survival rate of the fetus is approximately seven percent, at twenty-four weeks thirty-five percent, and at twenty-five weeks forty-seven percent. The case at bar thus demonstrates how long the risk of liability for fetal murder may run under the lead opinion's view before the actor either knows or has reason to know that the victim of the offense even exists. I cannot believe the Legislature intended such an enlargement of liability for the crime of capital murder. . . .

Finally, the lead opinion's construction of the 1970 amendment will make our murder law unique in the nation in its severity: It appears that in no other state is it a capital offense to cause the death of a viable and invisible fetus that the actor neither knew nor had reason to know existed.

To begin with, in the majority of states the killing of a fetus is not a homicide in any degree: "The majority of jurisdictions which have confronted the issue has followed *Keeler* . . . in holding the term 'fetus' does not fall within the definition of a human being under criminal statutes unless the term is so defined by the legislature." . . . In those jurisdictions a live birth remains a prerequisite to a conviction of homicide.

There are, of course, jurisdictions that have enacted statutes criminalizing the killing of a fetus. The lead opinion cites seven such jurisdictions. My research has turned up at least twenty-two, with two additional jurisdictions so holding as a matter of common law. For convenience I have grouped these jurisdictions into three distinct categories.

First, in at least thirteen jurisdictions the killing of a fetus is not criminal unless the fetus is viable or has reached a gestational age significantly more advanced than the "seven or eight weeks" prescribed by the lead opinion (in seven of these states, the crime is manslaughter rather than murder).

The second category of jurisdictions is composed of those in which the legislature has expressly declared that the killing of a product of conception is criminal regardless of its gestational age; contrary to our CPC section 187, therefore, these statutes purport to apply to both viable and nonviable fetuses and to embryos—even to zygotes. There are at least six states in this category. In three the crime is not murder but a lesser offense. Thus Arizona's statute is modeled on those of the eight states discussed above that criminalize the killing of an unborn child by means of an injury to its mother; unlike those statues, the Arizona measure applies not just to a "quick" unborn child but to an unborn child "at any stage of its development"; like those statutes, however, the Arizona offense is deemed manslaughter. . . . In Arkansas the offense is deemed first-degree battery and is punishable by imprisonment for not less than five nor more than twenty years; in New Mexico the offense is called "injury to [a] pregnant woman" and is punishable by imprisonment for three years with a possible fine of $5,000. . . .

The third and last category of jurisdictions is composed of those in which the statute neither prescribes a minimum gestational age for a conviction of fetal murder nor expressly declares that it applies regardless of gestational age; rather, the statute is facially silent on the matter. California is such a jurisdiction, and there are at least five others. Of these Utah is the only state that, like California, criminalizes the killing of a fetus under its general murder statutes: It defines homicide as the killing of "another human being, including an unborn child." But unlike California, in Utah the crime is a capital offense only if the actor caused the death of the unborn child "intentionally or knowingly," even in a felony-murder case. If, as in the case at bar, the death occurred in the commission of a listed felony but the actor did not kill "intentionally or knowingly," the crime is non-capital murder punishable by imprisonment for not less than five years.

In the remaining four states the offense is given special treatment and is punished much less severely than in California. In two of these states the offense is deemed "feticide." Thus in Indiana one who "knowingly or intentionally" terminates a pregnancy commits feticide, punishable by imprisonment for four years with a possible fine of not more than $10,000. In Louisiana one who kills an unborn child intentionally or in the commission of a listed felony commits first-degree feticide punishable by imprisonment for not more than fifteen years. In South Dakota one who "intentionally kills a human fetus by causing an injury to its mother" commits a felony punishable by imprisonment for ten years with a possible fine of $10,000. And in New Hampshire one who "[p]urposely or knowingly causes injury to another resulting in miscarriage or stillbirth" commits first-degree assault punishable by imprisonment for not more than fifteen years with a possible fine not to exceed $4,000.

Robert Keeler's act of assaulting his estranged wife for the express purpose of terminating her pregnancy by knowingly and intentionally killing her fully viable fetus would have been a crime in all the jurisdictions discussed above that have abrogated the common law rule. It would certainly be a crime in California today. But I cannot believe that in amending CPC section 187 to make that act a crime, the Legislature also intended to make California the only state in the Union in which it is a capital offense to cause the death of a nonviable and invisible fetus that the actor neither knew nor had reason to know existed. Yet this, again, is where the lead opinion's construction of the 1970 amendment inexorably takes us. I dissent from that construction. . . .

Questions for Discussion

1. Why is the wording of the jury instruction significant in this case? How does it impact on the defendant's guilt or innocence? What is the holding of the California Supreme Court?
2. Courts are criticized for "judicial legislation," making the law rather than interpreting statutes passed by the legislative branch. In interpreting the term "fetus," did the California Supreme Court follow the intent of the California legislature or impose its own view?
3. What is the relationship between *Davis* and *Keeler v. Superior Court?* How does the California Supreme Court distinguish the decision in *Davis* from the U.S. Supreme Court holding in *Roe v. Wade?*
4. Judge Mosk argues that the defendant could not have reasonably been aware that Maria Flores was pregnant. Why is this significant?
5. How does the approach of the California Supreme Court in defining a fetus differ from other states? In your opinion, is the California Supreme Court being directed by science, religion, or politics? Do you agree with the decision of the California Supreme Court?

Cases and Comments

1. ***Killing of a Fetus That Would Not Have Survived.*** In *People v. Valdez,* defendants Elisio Valdez and Johnnie Ray Peraza were convicted of the murders of Andrea Mestas and her fetus and various other serious felonies. Mestas was shot in the chest at close range. The bullet penetrated Andrea's heart and killed Andrea and her sixteen- to seventeen-week-old male fetus. The prosecutor theorized that the defendants were ordered to kill Mestas and her boyfriend on the orders of a prison gang, Nuestra Familia. The gang allegedly viewed Mestas as a "rat" and a "snitch." The two defendants received multiple life sentences as well as additional prison time. A medical examination of the fetus revealed that there was "chronic inflammation of the implantation site where the placenta attaches to the uterine wall as well as acute inflammation of the membrane surrounding the fetus." As a result, doctors concluded that it was "unlikely that the fetus would have survived." The defendants appealed on the grounds of "survivability," meaning that they should have been acquitted based on the fact that it was unlikely that the fetus would have completed gestation and been born in any event. In other words, the "killing of a non-survivable" fetus is "not comparable to murder; it is a much less serious offense because the non-survivable fetus is not a potential human life." The Court of Appeal of California, Third Appellate District, ruled that "just as the state may penalize an act that unlawfully shortens the existence of a terminally ill human being, it may penalize an act that unlawfully shortens the existence of a fetus which later would have perished before birth due to natural causes." Was the fetus a "potential life"? Do you agree with the court's decision? See *People v. Valdez,* 23 Cal. Rptr. 3d 909 (Cal. Ct. App. 2005).

2. ***Alcohol Abuse and the Attempted Murder of a Fetus.*** Deborah J.Z. was drinking in a local bar one week before her due date. She believed that she was about to give birth and called her mother, who drove her to the hospital. Deborah was "uncooperative, belligerent at times and very intoxicated." Her blood alcohol concentration exceeded 0.30%. She reportedly told the nurse that "if you don't keep me here, I'm just going to go home and keep drinking and drink myself to death and I'm going to kill this thing because I don't want it anyways." Deborah also expressed anxiety concerning the baby's "race, an abusive relationship she was in, and the pain of giving birth." Deborah consented to a cesarean section and gave birth to a baby girl, M.M.Z. M.M.Z. was extremely small, "she had no subcutaneous fat and her physical features—mild dysmorphic abnormalities—presented fetal alcohol effects." M.M.Z.'s blood alcohol level was 0.119%. The baby recovered after several weeks. Deborah was subsequently charged with attempted first-degree murder and first-degree reckless injury. Deborah appealed the trial court's denial of her motion to dismiss the charges.

A Wisconsin appellate court rejected the prosecution's contention that the murder statute's punishment of an individual who caused the death of a "human being" or who caused great bodily harm to a "human being" included a fetus. The court noted that Wisconsin law defined a human being as "one who has been born alive." A broad interpretation of the statute, noted the court, would risk criminal charges against a woman whose behavior during a pregnancy placed an unborn child at risk. A woman under these circumstances might be reluctant to seek prenatal care, fearing that she may be accused of endangering her unborn child. The court also suggested that prosecuting a woman for the treatment of her unborn fetus threatened to burden a woman's right to seek an abortion.

The Wisconsin court concluded that the decision whether to extend protection to an "unborn child" was a matter to be decided by the state legislature. See *State v. Deborah J.Z.,* 596 N.W.2d 490 (Wis. Ct. App. 1999). The South Carolina Supreme Court, on the other hand, ruled that a woman was properly convicted of child neglect who caused her baby to be born with cocaine metabolites in its system by reason of her ingestion of crack cocaine during the third trimester of her pregnancy. See *Whitner v. State,* 492 S.E.2d 777 (S.C. 1997). The Maryland Court of Appeals determined that a pregnant woman may not

be held criminally liable for negligent endangerment of a fetus. The court reasoned that holding a woman responsible would potentially subject her to prosecution for a range of activities, including drinking alcohol or smoking in moderation as well as skiing or riding horses. *See Kilmon v. State,* 905 A.2d 306 (Md. 2006).

You Decide

11.1 Kurr killed her boyfriend, Antonio Pena, with a knife. She argued with him over cocaine use and Pena punched her twice in the stomach. She warned him not to hit her since she was pregnant with their babies. Pena came toward her once again, and she killed him. Kur claimed the right to "intervene" to protect the fetuses that were sixteen or seventeen weeks in gestation. Will this defense prove successful? See *People v. Kurr,* 654 N.W.2d 651 (Mich. Ct. App. 2002).

You can find the answer at www.sagepub.com/lippmanccl2e

The End of Human Life

The question of when life ends seems like a technical debate that should be the concern of doctors and philosophers rather than lawyers and criminal justice professionals.

The traditional definition of death required the total stoppage of the circulation of the blood and the cessation of vital functions, such as breathing. This definition was complicated by technology that, over the last decades, developed to the point that a "brain dead" individual's breathing and blood flow could be maintained through artificial machines despite the fact that the brain had ceased to function.

In 1970, Kansas became the first state to legislate that death occurs when an individual experiences an irreversible cessation of breathing and heartbeat or there is an absence of brain activity. A majority of state legislatures and courts now have adopted a **brain death test** for death.[15] The circulatory and respiratory and brain death tests are incorporated as alternative approaches in the Uniform Determination of Death Act, a model law developed by the American Bar Association and American Medical Association.

The brain death test has also been adopted by courts in states without a statute defining death. In the Arizona case of *State v. Fierro,* the deceased, Victor Corella, was shot in the chest and head by a rival gang member and was rushed to the hospital where he was operated on and, although his brain had ceased to function, he was placed on a life support system. The doctor's, convinced that nothing could be done to save Corella's life, removed him from the life support machine after four days. The defendant argued that the removal of Corella from the life support machine was the proximate cause of death. The Arizona Supreme Court ruled that under Arizona law, death could be shown by either a lack of bodily function or brain death and concluded that the victim was legally dead before being placed on life support.[16]

As we noted in discussing causation, the year-and-a-day rule provides that an individual is criminally responsible only for a death that occurs within one year of his or her criminal act. This common law standard is still followed in several states. Note that in these states, under the traditional vital function test, a defendant could not be held legally responsible for the death of an individual who is maintained on a life support machine for longer than a year.

Mens Rea and Criminal Homicide

The *mens rea* of criminal homicide encompasses all of the mental states that we discussed in Chapter 5. The Utah criminal code provides that an individual commits criminal homicide "if he intentionally, knowingly, recklessly, with criminal negligence" or acting with the "mental state . . . specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of development."[17] Two forms of criminal homicide that we will review later in the chapter, felony murder and misdemeanor manslaughter, involve strict liability. The **grading**, or assignment of degrees to homicide, is based on a defendant's criminal intent. As we shall see, an individual who kills as a result of premeditation and deliberation is considered more dangerous and morally blameworthy than an individual who kills as a result of a reckless disregard or negligence.

Murder

We have seen that murder is the unlawful killing of an individual with malice aforethought. Several types of murder are discussed in this chapter, and your challenge is to learn the difference between each of these categories of homicide:

- First-degree murder
- Capital and aggravated first-degree murder
- Second-degree murder
- Depraved heart murder
- Felony murder
- Corporate murder

First-Degree Murder

First-degree murder is the most serious form of homicide and can result in the death penalty in thirty-five states.

The *mens rea* of first-degree murder requires deliberation and premeditation as well as malice. Premeditation means the act was thought out prior to committing the crime. Deliberation entails an intent to kill that is carried out in a cool state of mind in furtherance of the design to kill. An intent to kill without deliberation and premeditation is second-degree murder.

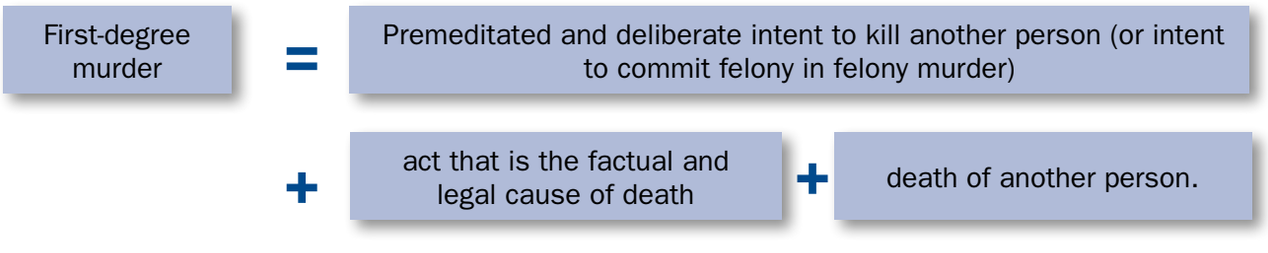
Why is first-degree murder treated more seriously than other forms of homicide? First, an individual who is capable of consciously devising a plan to take the life of another obviously poses a threat to society. A harsh punishment is both deserved and may deter others from cold and calculated killings. Some commentators dispute whether a deliberate and premeditated murderer poses a greater threat than the impulsive individual who lacks self-control and may explode at any moment in reaction to the slightest insult. Assuming that you were asked to formulate a sentencing scheme, which of these two killers would you punish most severely?

The general rule is that premeditation may be formed in the few seconds it takes to pull a trigger or deliver a fatal blow. A West Virginia court observed that the "mental process necessary to constitute 'willful, deliberate and premeditated' murder can be accomplished very quickly or even in the proverbial 'twinkling of an eye.'"[18]

A small number of judges continue to resist the trend toward recognizing that a premeditated intent to kill need only exist for an instant. These jurists point out that unless the prosecution is required to produce proof of premeditation and deliberation, it is difficult to tell the difference between first- and second-degree murder. In *State v. Bingham,* the Washington Supreme Court reversed a defendant's conviction for aggravated first-degree murder. The court held that the fact that the assailant choked the female victim for three to five minutes during an act of sexual intercourse did not constitute sufficient evidence that the defendant premeditated and deliberated the victim's death. In the view of the court, manual strangulation alone is not sufficient to support a finding of premeditation. The defendant might have placed his hand around the victim's neck to quiet her and there also is a question whether the defendant had the capacity to deliberate while engaged in sexual activity.[19] What evidence might have established premeditation? In order to establish premeditation and deliberation, judges generally require either evidence of planning or evidence that the defendant possessed a motive to kill and that the killing was undertaken in a fashion that indicates that it was planned, such as "lying in wait" or the use of a bomb or poison.[20]

State v. Forrest raises the issue of whether all killings involving premeditation and deliberation should be harshly punished.

The Legal Equation



Should the defendant be held responsible for the premeditated and deliberate killing of his father?

State v. Forrest, *362 S.E.2D 252 (N.C. 1987), Opinion by: Meyer, J.*

Defendant was convicted of the first-degree murder of his father, Clyde Forrest. The . . . defendant was sentenced . . . to life imprisonment. In his appeal to this Court, defendant brings forward three assignments of error . . . [W]e find no error in defendant's trial. We therefore leave undisturbed defendant's conviction and life sentence.

Facts

The facts of this case are essentially uncontested, and the evidence presented at trial tended to show the following series of events. On 22 December 1985, defendant John Forrest admitted his critically ill father, Clyde Forrest, Sr., to Moore Memorial Hospital. Defendant's father, who had previously been hospitalized, was suffering from numerous serious ailments, including severe heart disease, hypertension, a thoracic aneurysm, numerous pulmonary emboli, and a peptic ulcer. By the morning of 23 December 1985, his medical condition was determined to be untreatable and terminal. Accordingly, he was classified as "No Code," meaning that no extraordinary measures would be used to save his life, and he was moved to a more comfortable room.

On 24 December 1985, defendant went to the hospital to visit his ailing father. No other family members were present in his father's room when he arrived. While one of the nurse's assistants was tending to his father, defendant told her, "There is no need in doing that. He's dying." She responded, "Well, I think he's better." The nurse's assistant noticed that defendant was sniffling as though crying and that he kept his hand in his pocket during their conversation. She subsequently went to get the nurse.

When the nurse's assistant returned with the nurse, defendant once again stated his belief that his father was dying. The nurse tried to comfort defendant, telling him, "I don't think your father is as sick as you think he is." Defendant, very upset, responded, "Go to hell. I've been taking care of him for years. I'll take care of him." Defendant was then left alone in the room with his father.

Alone at his father's bedside, defendant began to cry and to tell his father how much he loved him. His father began to cough, emitting a gurgling and rattling noise. Extremely upset, defendant pulled a small pistol from his pants pocket, put it to his father's temple, and fired. He subsequently fired three more times and walked out into the hospital corridor, dropping the gun to the floor just outside his father's room.

Following the shooting, defendant, who was crying and upset, neither ran nor threatened anyone. Moreover, he never denied shooting his father and talked openly with law enforcement officials. Specifically, defendant made the following oral statements: "You can't do anything to him now. He's out of his suffering." "I killed my daddy." "He won't have to suffer anymore." "I know they can burn me for it, but my dad will not have to suffer anymore." "I know the doctors couldn't do it, but I could." "I promised my dad I wouldn't let him suffer."

Defendant's father was found in his hospital bed, with several raised spots and blood on the right side of his head. Blood and brain tissue were found on the bed, the floor, and the wall. Though defendant's father had been near death as a result of his medical condition, the exact cause of the deceased's death was determined to be the four point-blank bullet wounds to his head. Defendant's pistol was a single-action .22-calibre five-shot revolver. The weapon, which had to be cocked each time it was fired, contained four empty shells and one live round.

At the close of the evidence, defendant's case was submitted to the jury for one of our possible verdicts: first-degree murder, second-degree murder, voluntary manslaughter, or not guilty. After a lengthy deliberation, the jury found defendant guilty of first-degree murder. Judge Cornelius accordingly sentenced defendant to the mandatory life term. . . .

Issue

In his second assignment of error . . . defendant argues that the trial court's submission of the first-degree murder charge was improper because there was insufficient evidence of premeditation and deliberation presented at trial. We do not agree, and we therefore overrule defendant's assignment of error. . . .

Reasoning

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome his reason.

Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred.

Here, many of the circumstances that we have held to establish a factual basis for a finding of premeditation and deliberation are present. It is clear, for example, that the seriously ill deceased did nothing to provoke defendant's action. Moreover, the deceased was lying helpless in a hospital bed when defendant shot him four separate times. In addition, defendant's revolver was a five-shot single-action gun which had to be cocked each time before it could be fired. Interestingly, although defendant testified that he always carried the gun in his job as a truck driver, he was not working on the day in question but carried the gun to the hospital nonetheless.

Holding

Most persuasive of all on the issue of premeditation and deliberation, however, are defendant's own statements following the incident. Among other things, defendant stated that he had thought about putting his father out of his misery because he knew he was suffering. He stated further that he had promised his father that he would not let him suffer and that, though he did not think he could do it, he just could not stand to see his father suffer any more. These statements, together with the other circumstances mentioned above, make it clear that the trial court did not err in submitting to the jury the issue of first-degree murder based upon premeditation and deliberation. Accordingly, defendant's . . . assignment of error is overruled. . . .

Dissenting, *Exum, C.J.*

Almost all would agree that someone who kills because of a desire to end a loved one's physical suffering caused by an illness which is both terminal and incurable should not be deemed in law as culpable and deserving of the same punishment as one who kills because of unmitigated spite, hatred, or ill will. Yet the Court's decision in this case essentially says there is no legal distinction between the two kinds of killing. Our law of homicide should not be so roughly hewn as to be incapable of recognizing the difference. I believe there are legal principles which, when properly applied, draw the desirable distinction and that both the trial court and this Court have failed to recognize and apply them. . . .

Questions for Discussion

1. What circumstantial evidence supports the conclusion that Forrest acted with premeditation and deliberation in killing his father?
2. Do you agree with Chief Judge Exum in his dissent that the law should distinguish between a killing that is intended to end the suffering of a loved one and a killing that is motivated by "unmitigated spite, hatred, or ill will"?
3. Does *Forrest* suggest that a murder committed with premeditation and deliberation is not necessarily more deserving of punishment than a crime committed out of passion?

Capital and Aggravated First-Degree Murder

For a deeper look at this topic, visit the study site.

Thirty-five states and the federal government authorize the death penalty. In some states this is called **capital murder**. The statutes in these jurisdictions typically provide for the death penalty or a life sentence in the case of a first-degree murder committed under conditions that make the killing deserving of the punishment of death or life imprisonment. Other states create a category termed *aggravated murder* that is subject to the death penalty or to life imprisonment. Those states that do not possess the death penalty punish aggravated murder by life imprisonment rather than death.

State capital murder or aggravated murder statutes typically reserve this harsh punishment for premeditated killings committed with the presence of various **aggravating factors** or special circumstances. The Virginia capital murder statute, for instance, includes willful, deliberate, and premeditated killing of a police officer, a killing by an inmate, and killing in the commission of or following a rape or sexual penetration, along with other factors.[21] These statutes differ from one another, but typically include the following aggravating circumstances:

- *Victim.* A killing of a police officer, a juvenile thirteen years of age or younger, or the killing of more than one victim.

- *Offender.* An escaped prison inmate or an individual previously convicted of an aggravated murder.
- *Criminal Act.* Terrorism, murder for hire, killing during a prison escape or to prevent a witness from testifying.
- *Felony Murder.* Killing committed during a dangerous felony.

The jury, in order to sentence a defendant to death, must find one or more aggravating circumstances and is required to determine whether these outweigh any **mitigating circumstances** that may be presented by the defense attorney. Some statutes list mitigating circumstances that the jury should consider. The Florida death penalty statute specifies a number of mitigating circumstances, including the fact that the defendant does not possess a significant history of criminal activity or suffered from a substantially impaired mental capacity, the defendant was under the influence of extreme mental or emotional disturbance or acted under duress, the victim participated in the defendant's conduct or consented to the act, or the defendant's participation was relatively minor.[22]

Owen v. State illustrates a murder that is considered to be deserving of the death penalty.

The Statutory Standard

Texas executes more individuals than any other state. Portions of the Texas statute are reprinted below:

Texas Penal Code Annotated Section 19.03. Capital Murder

(1) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) [intentionally, knowingly or a dangerous act committed during or in furtherance of a felony] and:
   (a) the person murders a peace officer or fireman who is acting in . . . official duty and who the person knows is a peace officer or fireman;
   (b) the person intentionally commits the murder in the course of . . . kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation or terroristic threat. . . .
   (c) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder. . . .
   (d) the person commits the murder while escaping . . . from a penal institution;
   (e) the person, while incarcerated in a penal institution murders another . . . who is employed in the institution . . . with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
   (f) the person . . . while incarcerated for an offense [of murder or capital murder] murders another; or while serving a sentence of life imprisonment . . . murders another. . . .
   (g) the person murders more than one person . . . during the same criminal transaction . . . or the murders are committed pursuant to the same scheme or course of conduct. . . .
   (h) the person murders an individual under six years of age.
   (i) An offense under this section is a capital felony

Did the defendant kill in a heinous, atrocious, or cruel fashion?

Owen v. State, *862 So. 2d 687 (Fla. 2003), Per Curiam*

Facts

This is the second appearance of Duane Owen before this Court to review a conviction and sentence of death for the murder of fourteen-year-old Karen Slattery. In 1990, we reversed his original conviction and sentence of death and remanded for a retrial. In early 1999, following retrial, Owen was again found guilty by a jury of the offense

of first-degree murder, and was further found guilty of attempted sexual battery with a deadly weapon or force likely to cause serious personal injury and burglary of a dwelling while armed. In March 1999, the same jury recommended, by a ten-to-two vote, that Owen should be sentenced to death. The judge followed the jury's recommendation, and on March 23, 1999, Owen was adjudicated guilty and sentenced to death for the murder of Karen Slattery.

In support of the sentence of death, the trial court found that four aggravating circumstances existed to support the death sentence: (1) the defendant had been previously convicted of another capital offense or a felony involving the use of violence to some person; (2) the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel (HAC); and (4) the crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated (CCP) manner without any pretense of moral or legal justification. In mitigation, the trial judge considered three statutory mitigating factors: (1) the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired; and (3) the age of the defendant at the time of the crime was twenty-three.

The victim was babysitting for a married couple on the evening of March 24, 1984, in Delray Beach. During the evening, she called home several times and spoke with her mother, the last call taking place at approximately 10 P.M. When the couple returned home, just after midnight, the lights and the television were off and the babysitter did not meet them at the door as was her practice. The police were summoned and the victim's body was found with multiple stab wounds. There was evidence that the intruder entered by cutting the screen to the bedroom window. He then sexually assaulted the victim. A bloody footprint, presumably left by the murderer, was found at the scene.

The facts surrounding the death of Georgianna Worden were substantially similar to those of the Slattery murder. As this Court detailed, "the body of the victim, Georgianna Worden, was discovered by her children on the morning of May 29, 1984, as they prepared for school. An intruder had forcibly entered the Boca Raton home during the night and bludgeoned Worden with a hammer as she slept, and then sexually assaulted her. This Court affirmed the conviction and sentence of death in that case and, notably, held that there was sufficient evidence to support the trial court's findings that the murder was especially heinous, atrocious, or cruel and that the murder was committed in a cold, calculated, and premeditated murder.

We have on appeal the judgment and sentence entered in the Fifteenth Judicial Circuit Court imposing the death penalty upon Duane Owen. For the reasons stated below, we affirm the judgment and sentence under review.

Issue

Owen next challenges the trial court's application of the aggravating factors of HAC and CCP. The law is well settled regarding this Court's review of a trial court's finding of an aggravating factor. . . . Judge Cohen found the State had proven the heinous, atrocious, or cruel aggravating factor beyond a reasonable doubt and applied great weight to that factor. . . .

Reasoning

Karen Slattery was stabbed or cut eighteen times. She was alive when all the wounds were inflicted. She was in terror. She undoubtedly had a belief of her impending doom. Her fear and heightened level of anxiety occurred over a period of time. Most important, the defendant told Dr. McKinley Cheshire that fear in his victim was necessary. The defendant stated that causing deliberate pain and fear would increase the flow of female bodily fluids which he needed for himself. The puncturing of Karen Slattery's lung caused her to literally drown in her own blood. She experienced air deprivation. Each of the eighteen cuts, slashes, and/or stab wounds caused pain by penetrating nerve endings in Miss Slattery's body. The crime of murdering Miss Slattery evidenced extreme and outrageous depravity. The defendant desired to inflict pain and fear on Miss Slattery "to increase the flow of her female bodily fluids which he needed for himself." The defendant showed an utter indifference to Karen Slattery's suffering. He was conscienceless and pitiless and unnecessarily torturous to Miss Slattery. She had an absolute full knowledge of her impending death with unimaginable fear and anxiety.

This Court has consistently upheld the HAC aggravator where the victim has been repeatedly stabbed. Furthermore, we have reasoned that the HAC aggravator is applicable to murders that "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." The HAC aggravator focuses on the means and manner in which death is inflicted. . . .

Here, the medical examiner testified that Slattery suffered eighteen stab wounds—eight to her upper back, four cutting wounds to the front of her throat, and six stab wounds to her neck. Five of the wounds penetrated her lungs, causing them to collapse, making it impossible for Slattery to breathe or speak. She would have experienced "air hunger"—the feeling of needing to breathe but not being able to do so. The doctor estimated that Slattery lost nearly her entire blood volume. The result of severe blood loss is shock, an involuntary and uncontrollable

condition that causes high anxiety and terror. The doctor explained that pain is a result of the nerve receptors in the skin being injured, and that people can experience a substantial amount of pain without suffering a lethal injury.

Although Slattery did not appear to have any defensive wounds, seven of the stab wounds were lethal and could have produced death. While the medical examiner could not determine which wounds were inflicted first, he believed they were all inflicted in rapid succession and all while Slattery was alive. The doctor opined that Slattery would have been capable of feeling pain as long as she was conscious, which he estimated would have been for between twenty seconds and two minutes, depending upon which wound was inflicted first. He testified that one minute was a reasonable estimate for how long Slattery remained conscious, as twenty seconds was too short, but two minutes would have been a "little long." During that time she would have felt pain, experiencing the additional stab wounds, would have felt terror and shock, would have been aware of her impending doom, would have become weaker as a result of blood loss, and would have been unable to cry out. Finally, according to the medical examiner, although she may have been dead prior to the occurrence, Slattery was sexually assaulted, and semen was found on both her internal and external genitalia.

In addition to the evidence presented by the medical examiner, the testimony of Owen's own mental health expert supports the finding of HAC. Dr. Frederick Berlin testified that Owen believed that by having sex with a woman he could obtain her bodily fluids, and that this would assist him in his transformation from a male to a female. Owen believed that if he had sex with a woman who was near death, his penis would act as a hose, and her soul would enter his body and they would "become one." Importantly, Owen believed that the more frightened the victim was, the better. This express need to cause his victim extreme fear clearly evinces an utter indifference to his victim's torture. On the basis of the entire record, Owen's killing of Karen Slattery unquestionably satisfies the requirements of HAC.

Owen's challenge to the finding of the CCP aggravator is likewise misplaced. This Court has established a four-part test to determine whether the CCP aggravating factor is justified: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) the defendant must have had no pretense of moral or legal justification.

In 1992, we held that the finding of CCP was properly applied to the murder of Georgianna Worden, a second murder for which Owen was convicted and sentenced to death. Although Worden was bludgeoned to death and not stabbed, the remaining facts of that murder were virtually identical to those of the Slattery homicide. . . .

Owen's confession to the Slattery murder demonstrates the similarities between the two murders. Owen admitted to cutting a screen out of a window to gain access to the home where Slattery was babysitting. . . .

According to Owen, he confronted Slattery near the phone as she was concluding a telephone conversation. He ordered her to return the phone to its cradle, and when she did not, he dropped his hammer, grabbed the phone from her hand, returned it to its base, and immediately began stabbing her. After Owen had stabbed Slattery, he checked on the children to ensure they had not awakened during the attack, and he then proceeded to lock the doors and turn off all the lights and the television. Owen then dragged Slattery by her feet into the bedroom, removed her clothes, and sexually assaulted her. He explained to the officer questioning him that he had only worn a pair of "short-shorts" into the house. After he sexually assaulted Slattery, Owen showered to wash the blood from his body, and then exited the house through a sliding glass door. He then returned to the home where he was staying and turned the clocks back to read 9:00 P.M. According to Owen, he did this to provide an alibi based on time. He admitted that after he turned the clocks back, he purposely asked his roommate the time. Owen bragged to the officers about his plan to turn back the clocks, explaining that he "had to be thinking."

Clearly, as with the Worden murder, the murder of Karen Slattery satisfies the requirements of CCP. The fact that Owen stalked Slattery by entering the house, observing her, leaving, and then returning after the children were asleep demonstrates that this murder was the "product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." . . . Further, Owen unquestionably had "a careful plan or prearranged design to commit murder," as evidenced by the fact that he removed his clothing prior to entering the house, wore socks and then gloves on his hands, confronted the fourteen-year-old girl with a hammer in one hand and a knife in the other, and, by his own admission, did not hesitate before stabbing Slattery eighteen times.

The third element of CCP, heightened premeditation, is also supported by competent and substantial evidence. We have previously found the heightened premeditation required to sustain this aggravator to exist where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing Slattery. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.

Finally, the appellant unquestionably had no pretense of moral or legal justification. Notably, Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused

him to kill. He did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female. He did not explain or disclose in any way that the more frightened the woman, the more bodily fluids she would secrete, and the more satisfying it would be for him. In fact, during his interrogation, Owen in no way attempted to justify his actions. Also, there is no indication in either of Owen's previous direct appeals to this Court, first for the Slattery murder and then for the Worden murder, that he has ever raised this justification in the past. Although the trial court determined that the statutory mental health mitigators were proven, the court also held that Owen had no pretense of legal or moral justification to rebut the finding of CCP. The trial court's ruling is supported by competent and substantial evidence.

Owen's claim that his mental illness must negate the CCP aggravator is unpersuasive. We have held: "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." . . . Here, the evidence clearly demonstrates that Owen entered the home where Slattery was babysitting with a definite plan to murder the victim and then sexually abuse the body. CCP was properly applied to the Slattery murder.

Holding

Having determined the legitimacy of the conviction, we turn next to the sentence of death. It is well settled that the purpose of our proportionality review is to "foster uniformity in death-penalty law." Further, the number of aggravating factors cannot simply be compared to the number of mitigating factors; rather there must be "a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." When compared to other decisions of this Court, the death sentence entered in this case is proportionate.

Questions for Discussion

1. What is the legal standard for determining whether a killing was committed in a "heinous, atrocious, or cruel" fashion?
2. Summarize the facts that support the court's conclusion that this standard was satisfied.
3. Do you believe that a murder committed in a "heinous, atrocious, or cruel" fashion merits a harsher penalty than other murders?
4. What facts support the allegation that the defendant killed in a "cold, calculated, and premeditated" fashion?

Cases and Comments

Torture Murder. The Pennsylvania capital murder statute includes the aggravating circumstance that the victim was killed by torture. John Phillip Ockenhouse was released on parole with the understanding that he would live in a house for parolees and submit to drug and alcohol treatment. Eleven days later, he entered the home of Naomi Spankowitch, killed her, and stole one hundred dollars. Ockenhouse pushed the ninety-one-year-old Spankowitch onto the bed, stuffed a pair of underwear into her mouth and jumped on her back with his knee, fracturing her spine. After breaking the victim's back, Ockenhouse left the bedroom and found a knife in the kitchen. He returned to the bedroom and stabbed Spankowitch seven times; one wound severed her right carotid artery. Ockenhouse then cut Spankowitch's neck, slicing through her throat to the spine and severing her carotid artery and jugular vein. An additional puncture wound was discovered on the victim's neck and the knife was found imbedded in Mrs. Spankowitch's back when her body was discovered.

The Pennsylvania Supreme Court held that the prosecution was required to prove beyond a reasonable doubt that the defendant "intentionally inflicted on the victim a considerable amount of pain and suffering that was unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity." The central requirement is an intent to cause pain and suffering in addition to the intent to kill. In other words, the killing alone is not sufficient. The Supreme Court stated that there must be suffering beyond that associated with murder. This involves an examination of the manner in which the murder is committed, including the number and type of wounds, whether the wounds were inflicted in areas of the body that indicate an intent to cause pain rather than to kill, whether the victim was conscious during the killing, and the duration of the episode.

The Pennsylvania Supreme Court determined that virtually all of the seven to ten wounds were deep and intended to kill, that it was unclear whether the victim was conscious during the episode, and that the events lasted only several minutes. The court noted that the central fact in determining that this was torture was Ockenhouse's confession that he jumped on Mrs. Spankowitch's back with his knee. This "evinced the additional intention to cause pain and suffering beyond his desire to merely kill." Is this standard sufficiently clear and precise? Does the court establish too high a standard for torture? How would you define torture? Would you sentence the defendant to death? See *Commonwealth v. Ockenhouse,* 756 A.2d 1130 (Pa. 2000).

You Decide

11.2 Eighteen-year-old Richard Henyard stole a pistol from a family friend. On January 29, 1993, Henyard told a friend that he planned to go to a nightclub in Orlando and to visit his father in South Florida and, while displaying the gun, confided that in order to make the trip that he planned to steal a car and to kill the owner. Henyard persuaded a fourteen-year-old friend, Alfonza Smalls, to participate in a robbery. The two young men followed Ms. Lewis as she left the grocery store and watched as she put her daughters, Jasmine, age three, and Jamilya, age seven, into her automobile. Smalls pulled up his shirt to reveal a gun and ordered Ms. Lewis and her daughters into the front seat.

Smalls told Ms. Lewis to "shut the girls up" and when Lewis cried out to Jesus for help, Henyard responded that "this ain't Jesus, this is Satan." Henyard subsequently stopped the car, ordered Ms. Lewis out of the car and raped Ms. Lewis on the trunk of the car while her daughters remained in the back seat. Smalls also raped Ms. Lewis on the trunk of the car. Henyard directed Lewis to sit on the edge of the road and when she hesitated he pushed her to the ground and shot her in the leg. Henyard subsequently shot Lewis three more times, wounding her in the neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls pushed Ms. Lewis's unconscious body off to the side of the road. Lewis subsequently regained consciousness and was able to alert the police. Henyard and Smalls then reentered the auto and drove away as Jasmine and Jamilya continued to cry and plead for their mother. Henyard stopped the car and led the two young girls to a grassy area where "they were each killed by a single bullet fired into the head. Henyard and Smalls threw the bodies of Jasmine and Jamilya Lewis over a nearby fence into some underbrush." The autopsies of Jasmine and Jamilya Lewis indicated that they both died of gunshot wounds to the head at very close range. The forensic evidence indicated that Jasmine's eye was open when she was shot. Henyard claimed that the heinous, atrocious, and cruel aggravating circumstance was not applicable because he had killed the two girls with a single shot and that they had not been physically harmed prior to their murder. What is your view? See *Henyard v. State,* 689 So. 2d 239 (Fla. 1996).

You can find the answer at www.sagepub.com/lippmanccl2e

Crime in the News

On January 11, 2002, a Cambridge, Massachusetts, jury comprised of nine women and three men, after deliberating thirteen hours, convicted Thomas Junta, a forty-four-year-old truck driver, of the involuntary manslaughter murder of Michael Costin, a forty-year-old part-time painter and carpenter. Judge Charles Grabau sentenced Junta to six to ten years in state prison, a sentence that was almost double what was called for under the Massachusetts sentencing guidelines.

Junta's conviction for the unintentional killing of Costin quickly became a much discussed example of what was described as an epidemic of "rink rage" and "sideline anger," in which parents' emotional involvement with their children during sports events was increasingly resulting in heated arguments and violence.

Junta arrived at the Burbank ice rink on July 5, 2000, to take his ten-year-old son Quinlan and two of his friends skating. After observing an informal hockey match, he concluded that Costin, who was acting as a volunteer referee, was allowing some of the players to engage in overly rough play. Junta's anger boiled over when his son Quinlan was reduced to tears when elbowed in the head. Junta charged onto the ice and protested that hockey was intended to be "fun." Costin allegedly replied, "No, that's hockey." The two men continued their argument following the end of practice and Junta alleged that Costin kicked him, tore off his necklace, and ripped his shirt. The two were separated by rink employees and Junta was ordered out of the arena; he told his son that he would meet him in the parking lot.

A few minutes later, Junta reappeared and pushed the female manager of the rink into the wall when she tried to prevent him from reentering the facility. According to Junta, he returned to the arena to ensure that his son was safe and acted in self-defense against Costin, whom various witnesses testified had thrown the first punch and was wearing skates and protective hockey pads. Junta explained to the police that Costin "could've been a black belt for all I know" and testified at the trial that he threw three off-balance punches against the side of Costin's head.

Most of the witnesses challenged Junta's version and testified that Junta pushed Costin down and pinned him to the ice and repeatedly pummeled Costa's face with his fists. The rink manager screamed that "[y]ou're going to kill him" and reported that the children observing the fight shouted at Junta to stop hitting Costin. Witnesses testified that Junta hit Costin at least six times before pushing Costin onto the ice and then continued to rain down punches. One mother who was at the rink testified that "[i]t's something I'll never forget. He went on and on, and I kept hollering and saying 'Stop' and I was thinking the whole time 'he's either going to kill this man or he was going to have brain damage.'" The medical evidence indicated that there were fifteen separate areas of trauma on Costin's body and that a strong blow ruptured an artery in Costin's head, which led to a brain hemorrhage. He slipped into a coma and died two days later.

This was not described as a fair fight. Junta was a 6'1", 270-pound truck driver who outweighed Costin by over one hundred pounds. Costin's fourteen-year-old son

(Continued)

(Continued)

Brendan testified that "I realized I had just witnessed my dad literally beat to death."

Both men were described as good fathers. Costin had volunteered to referee the scrimmage in order to spend time with kids. The judge barred the jury from hearing evidence that Costin had spent a lengthy time in prison, had been an alcoholic, and was on several medications to treat anxiety and depression. He recently had turned his life around and had assumed custody of his four kids. Following the verdict, Costin's sister described her brother as a "loving brother, a caring son, but most of all . . . a dedicated father." Junta was the father of two children and was described by his lawyer as a "gentle giant." The jury did not hear evidence regarding Junta's hot temper and alleged domestic violence.

The question remains whether the incident at the Burbank hockey rink should be viewed as a confrontation between two men with explosive personalities or whether it provides a warning regarding the serious consequences of the overinvolvement of parents with the athletic performance of their kids. Studies indicate that roughly fifteen percent of parents act aggressively while watching their children. There have been a number of instances over the past few years in which parents have been charged with crimes after charging the field and attacking umpires or after assaulting the coaches of opposing teams. Should the law single out parents for harsh punishment or should society tolerate the aggressive conduct of parents as part of the game?

Second-Degree Murder

State second-degree murder statutes typically punish intentional killings that are committed with malice aforethought that are not premeditated, justified, or excused. Most statutes go beyond this simple statement and provide that killings committed with malice aforethought that are not specifically listed as first-degree murder are considered second-degree murder. For instance, several states include felony murder as second- rather than first-degree murder.

Washington State provides that a person is guilty of murder in the second degree when with "the intent to cause the death of another person but without premeditation he causes the death of such person." The statute also includes as second-degree murder a killing committed in furtherance or flight from a felony.[23] Idaho merely provides that all killings that are not explicitly included in the first-degree statute "are of the second degree." This means that an Idaho prosecutor is authorized to charge second-degree murder in all instances in which a murder does not fall within the state's first-degree murder statute.[24]

The Louisiana statute states that second-degree murder is the killing of a human being when the "offender has a specific intent to kill or to inflict great bodily harm." The law also provides that second-degree murder includes:

- A killing that occurs during the perpetration or attempted perpetration of aggravated rape, arson, burglary, kidnapping, escape, a drive-by shooting, armed robbery or robbery, despite the fact that the individual possesses no intent to kill or to inflict great bodily harm.
- A killing that occurs in the perpetration of cruelty to juveniles, despite the fact that an individual has no intent to kill or to inflict great bodily harm.
- A killing that directly results from the unlawful distribution of an illegal narcotic.[25]

The next case, *Midgett v. State,* is based on an Arkansas second-degree murder statute that punishes an individual who "knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life." The statute also punishes a killing that is committed when, with the "purpose of causing serious physical injury to another person, he [the perpetrator] causes the death of another person."[26] In reading *Midgett,* remember that malice may be express or implied. Express malice is the deliberate intent to unlawfully take the life of another individual. Implied malice involves a killing that results from an intentional act, the natural consequences of which are dangerous to life.

The Legal Equation

Second-degree murder = Intentional act dangerous to the life of another

+ intent to kill without premeditation and deliberation or intent to commit underlying felony for felony murder

+ causing the death of another person.

Is Midgett guilty of first- or second-degree murder?

Midgett v. State, *729 S.W.2D 410 (ARK. 1987), Opinion by: Newbern, J.*

Issue

This child abuse case resulted in the appellant's conviction of first-degree murder. The sole issue on appeal is whether the state's evidence was sufficient to sustain the conviction. We hold there was no evidence of the " . . . premeditated and deliberated purpose of causing the death of another person . . ." required for conviction of first-degree murder. However, we find the evidence was sufficient to sustain a conviction of second-degree murder . . . as the appellant was shown to have caused his son's death by delivering a blow to his abdomen or chest " . . . with the purpose of causing serious physical injury." The conviction is thus modified from one of first-degree murder to one of second-degree murder and affirmed.

Facts

The facts of this case are as heartrending as any we are likely to see. The appellant is six feet two inches tall and weighs 300 pounds. His son, Ronnie Midgett, Jr., was eight years old and weighed between thirty-eight and forty-five pounds. The evidence showed that Ronnie Jr. had been abused by brutal beating over a substantial period of time. Typically, as in other child abuse cases, the bruises had been noticed by school personnel, and a school counselor . . . had gone to the Midgett home to inquire. Ronnie Jr. would not say how he had obtained the bruises or why he was so lethargic at school except to blame it all, vaguely, on a rough playing little brother. He did not even complain to his siblings about the treatment he was receiving from the appellant. His mother, the wife of the appellant, was not living in the home. The other children apparently were not being physically abused by the appellant.

Ronnie Jr.'s sister, Sherry, aged ten, testified that on the Saturday preceding the Wednesday of Ronnie Jr.'s death, their father, the appellant, was drinking whiskey (two to three quarts that day) and beating on Ronnie Jr. She testified that the appellant would "bundle up his fist" and hit Ronnie Jr. in the stomach and in the back. On direct examination she said that she had not previously seen the appellant beat Ronnie Jr., but she had seen the appellant choke him for no particular reason on Sunday nights after she and Ronnie Jr. returned from church. On cross-examination, Sherry testified that Ronnie Jr. had lied and her father was, on that Saturday, trying to get him to tell the truth. She said the bruises on Ronnie Jr.'s body noticed over the preceding six months had been caused by the appellant. She said the beating administered on the Saturday in question consisted of four blows, two to the stomach and two to the back.

On the Wednesday Ronnie Jr. died, the appellant appeared at a hospital carrying the body. He told hospital personnel something was wrong with the child. An autopsy was performed, and it showed Ronnie Jr. was a very poorly nourished and underdeveloped eight-year-old. There were recently caused bruises on the lips, center

of the chest plate, and forehead as well as on the back part of the lateral chest wall, the soft tissue near the spine, and the buttocks. There was discoloration of the abdominal wall and prominent bruising on the palms of the hands. Older bruises were found on the right temple, under the chin, and on the left mandible. Recent as well as older, healed, rib fractures were found.

The conclusion of the medical examiner who performed the autopsy was that Ronnie Jr. died as the result of intra-abdominal hemorrhage caused by a blunt force trauma consistent with having been delivered by a human fist. The appellant argues that in spite of all this evidence of child abuse, there is no evidence that he killed Ronnie Jr. having premeditated and deliberated causing his death. We must agree. . . .

The evidence in this case supports only the conclusion that the appellant intended not to kill his son but to further abuse him or that his intent, if it was to kill the child, was developed in a drunken, heated, rage while disciplining the child. Neither of those supports a finding of premeditation or deliberation.

Perhaps because they wish to punish more severely child abusers who kill their children, other states' legislatures have created laws permitting them to go beyond second-degree murder. . . . Idaho has made murder by torture a first-degree offense, regardless of intent of the perpetrator to kill the victim, and the offense is punishable by the death penalty. . . .

Holding

All of this goes to show that there remains a difference between first- and second-degree murder, not only under our statute, but generally. Unless our law is changed to permit conviction of first-degree murder for something like child abuse or torture resulting in death, our duty is to give those accused of first-degree murder the benefit of the requirement that they be shown by substantial evidence to have premeditated and deliberated the killing, no matter how heinous the facts may otherwise be. . . .

The dissenting opinion begins by stating the majority concludes that one who starves and beats a child to death cannot be convicted of murder. That is not so, as we are affirming the conviction of murder; we are, however, reducing it to second-degree murder. The dissenting opinion's conclusion that the appellant starved Ronnie Jr. must be based solely on the child's underdeveloped condition which could, presumably, have been caused by any number of physical malfunctions. There is no evidence the appellant starved the child. The dissenting opinion says it is for the jury to determine the degree of murder of which the appellant is guilty. That is true so long as there is substantial evidence to support the jury's choice. The point of this opinion is to note that there was no evidence of premeditation or deliberation, which are required elements of the crime of first-degree murder. . . .

In this case we have no difficulty with reducing the sentence to the maximum for second-degree murder. The jury gave the appellant a sentence of forty years imprisonment which was the maximum for first-degree murder, and we reduce that. . . . [T]he obvious effect the beatings were having on Ronnie Jr. and his emaciated condition when the final beating occurred are circumstances constituting substantial evidence that the appellant's purpose was to cause serious physical injury, and that he caused his death in the process. That is second-degree murder. . . . Therefore, we reduce the appellant's sentence to imprisonment for twenty years.

Dissenting, *Hickman, J.*

Simply put, if a parent deliberately starves and beats a child to death, he cannot be convicted of the child's murder. In reaching this decision, the majority . . . substitutes its judgment for that of the jury. The majority has decided it cannot come to grips with the question of the battered child who dies as a result of deliberate, methodical, intentional and severe abuse. A death caused by such acts is murder by any legal standard, and that fact cannot be changed—not even by the majority. The degree of murder committed is for the jury to decide—not us.

In this case the majority, with clairvoyance, decides that this parent did not intend to kill his child, but rather to keep him alive for further abuse. This is not a child neglect case. The state proved Midgett starved the boy, choked him, and struck him several times in the stomach and back. The jury could easily conclude that such repeated treatment was intended to kill the child. . . .

The facts in this case are substantial to support a first-degree murder conviction. The defendant was in charge of three small children. The victim was eight years old and had been starved; he weighed only 38 pounds at the time of his death. He had multiple bruises and abrasions. The cause of death was an internal hemorrhage due to blunt force trauma. His body was black and blue from repeated blows. The victim's sister testified she saw the defendant, a 30-year-old man, 6'2" tall, weighing 300 pounds, repeatedly strike the victim in the stomach and back with his fist. One time he choked the child.

The majority is saying that as a matter of law a parent cannot be guilty of intentionally killing a child by such deliberate acts. Why not? Is it because it is inconceivable to rational people that a parent would intend to kill his own child? Evidently, this is the majority's conclusion, because they hold the intention of Midgett was to keep him alive for further abuse, not kill him. How does the majority know that? How do we ever know the actual or subliminal intent of a defendant? . . . This parent killed his own child, and the majority cannot accept the fact that he intended to do just that.

Undoubtedly, the majority could accept it if the child were murdered with a bullet or a knife; but they cannot accept the fact, and it is a fact, that this defendant beat and starved his own child to death. His course of conduct could not have been negligent or unintentional. . . . He is guilty of first-degree murder in the eyes of the law. His moral crime as a father is another matter, and it is not for us to speculate why he did it.

Questions for Discussion

1. Why did the Arkansas Supreme Court rule that Midgett is guilty of second- rather than first-degree murder? Summarize the dissenting view that Midgett killed his son in a premeditated and deliberate manner.
2. Midgett was charged and convicted of the death of his son inflicted with the purpose of causing serious physical injury. Why was Midgett not charged with knowingly causing the death of another person under circumstances manifesting extreme indifference to the value of human life?
3. Are you confident that judges and juries are able to clearly determine a defendant's intent from the nature of his criminal acts? Do you agree with the majority or with the dissent?
4. Based on this case, do you question whether first-degree murder is always a more serious offense than second-degree murder?
5. One month following the decision in *Midgett,* the Arkansas legislature amended the state's criminal code to authorize a verdict of first-degree criminal homicide when an individual under "circumstances manifesting extreme indifference to the value of human life . . . knowingly causes the death of a person fourteen years of age or younger at the time the murder was committed." See Ark. Code Ann. § 5–10–101(a)(9). Would this statute result in a different verdict in *Midgett?*

You Decide

11.3 Kenith Wayne Sherrill appealed his murder conviction on the grounds that the evidence did not support his conviction for the premeditated first-degree murder of his girlfriend, Teressa. Kenith and Teressa Hilton had lived together for roughly three years. On the evening of July 6, 2004, Kenith's son found Teressa, "her face 'all black and blue,' lying on the floor in the back of [her] trailer." The police and paramedics were unable to revive Teressa. Kenith reportedly smelled of alcohol and explained that they had been drinking, gotten into a fight, and that Teressa had "spaced out" and stopped breathing. An autopsy revealed roughly forty-two "separate blunt impact injuries." Teressa suffered internal injuries to her brain and abdominal areas, several fractured ribs, a lacerated liver, and significant internal bleeding in her chest area. Kenith argued that there was no indication that the injuries had been inflicted through the use of a dangerous weapon and that the Washington Supreme Court had held that physical force (strangulation) alone is insufficient to support a finding of premeditation "where no evidence was presented of deliberation or reflection before or during the strangulation." However, the prosecution pointed out that manual strangulation involves a single continuous act and the multiple attacks in this incident stretched out over several hours. The premeditated nature of Kenith's attack was supported by a history of domestic violence. In 2003, Teressa was taken to the emergency room for treatment after being beaten unconscious and in 2004, Kenith was arrested for fighting with Teressa. A close friend of Teressa testified that Teressa "had bruises on her body and face, and bald spots on her head where Mr. Sherrill ripped her hair out. . . . On one occasion, Teressa's nose was nearly torn off." The evidence indicated that "blood spatter was found in the kitchen, bathroom, living room, and outside on the step and wheels of the trailer. The appliances and carpet had blood on them. Blood and hair was found on a VCR and television receiver as well as on a step outside the door." The defense argued that an inference of premeditation ordinarily required the use of a weapon and evidence of a fatal blow or fatal blows. The absence of a weapon was significant because both Kenith and Teressa were slight of stature and Kenith could not have physically overwhelmed Teressa. The evidence indicated that Teressa suffered three traumatic injuries (brain, chest, liver), none of which were individually fatal, that occurred over some time and took place in a number of rooms while the victim was both standing up and lying on the ground. Was Kenith guilty of first-degree murder or second-degree murder? See *State v. Sherrill,* 186 P.3d 1157 (Wash. Ct. App. 2008).

You can find the answer at www.sagepub.com/lippmanccl2e

Depraved Heart Murder

An individual may be held criminally responsible for depraved heart murder in those instances that he or she kills another as a result of the "deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not."[27] A defendant who acts in this fashion is viewed as manifesting an "abandoned and malignant heart" or "depraved indifference to human life."[28] Reckless homicide is based on the belief that acts undertaken without an intent to kill that severely and seriously endanger human life are "just as antisocial and . . . just as truly murderous as the specific intent to kill and to harm." Malice is implied in the case of depraved heart murder, and this is typically punished as second-degree murder. The California Penal Code states that malice is "implied . . . when the circumstances attending the killing show an abandoned and malignant heart."[29]

Depraved heart murder requires:

- *Conduct.* The defendant's act must create a very high degree of risk or serious bodily injury. Keep in mind that the act must be highly dangerous.
- *Intent.* The defendant must be aware of the danger created by his or her conduct. Some courts merely require that a reasonable person would have been aware of the risk.
- *Danger.* The common law appeared to require that a number of individuals were placed in danger; the modern view is that it is sufficient that a single individual is at risk.

There is no mathematical formula for determining whether an act satisfies the highly dangerous standard of depraved heart murder. This is decided based on the facts of each case. Examples of depraved heart murder include:

- A defendant plays a game of "Russian Roulette" in which he loads a revolver with one bullet and six "dummy bullets" and spins the chamber. He places the gun to the victim's head and pulls the trigger three times; the third pull kills the victim.[30]
- A defendant shoots into a passing train, unintentionally killing a passenger.[31]
- Two street gangs engage in a lengthy shoot-out on a street in downtown Baltimore, killing an innocent fifteen-year-old.[32]
- The defendant pours gasoline through the mail slot of the victim's house and sets the gasoline on fire, killing two children.[33]

The next case, *State v. Davidson,* involves a conviction for depraved heart murder. Pay attention to the facts that led the Kansas Supreme Court to affirm the defendant's guilt for the killing of a human being "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."[34]

The Legal Equation

Depraved heart murder = Dangerous act creating a high risk of death + knowledge of danger created by act.

Did the defendant manifest an extreme indifference to the value of human life based on her failure to control her dogs?

State v. Davidson, *987 P.2D 335 (KAN. 1999),* Opinion by: Allegrucci, J.

Defendant Sabine Davidson was convicted of reckless second-degree murder and endangering a child. She appeals her conviction of reckless second-degree murder. . . . The question we must resolve is whether . . . the State presented evidence sufficient to sustain a conviction of reckless second-degree murder.

Facts

Davidson's challenge to the law and the evidence rests on the same premise: that the State proved only that she failed to confine her dogs. The statute requires the State to prove that her conduct "manifested extreme indifference to the value of human life." At best, she argues that her conduct constituted a negligent omission to confine the dogs and she should have been charged with involuntary manslaughter. Simply stated, she argues that the crime of second-degree murder does not fit her conduct. . . . The state's evidence established numerous earlier incidents involving defendant's dogs. . . .

Fifteen-year-old Margaret Smith, who lived near the Davidsons, testified that sometime during the 1995–1996

school year, two dogs chased her and Jeffrey Wilson away from the school bus stop as they waited there in the morning. She believed that the dogs belonged to the Davidsons. . . . Deputy Shumate had been to the Davidson house in January 1996 when one of the neighbors complained about their dogs running loose. The complainant said that his wife was afraid of the dogs, a German shepherd and a Rottweiler. When Shumate went to the Davidson house on that occasion, Sabine Davidson told him that she would keep the dogs in the fenced enclosure. The fenced enclosure that Shumate saw in January 1996 was still in use in April 1997.

Learie Thompson, who lives near the Davidsons, complained to the sheriff's office in January 1996 because the Davidsons' dogs were in his yard. He recalled three to five times earlier when the dogs were loose and came into his yard. For the most part, the dogs Thompson saw in his yard were German shepherds. Thompson testified that he was afraid of the Davidsons' dogs because they were big and aggressive toward people. When the dogs were in their fenced enclosure, they would rage and growl and try to get out of the fence. . . . [E]arly on the morning that Chris was killed, as Thompson opened his garage door to leave for work, the Davidsons' three Rottweiler dogs rushed into the garage. Thompson jumped up onto his truck. The dogs stood on their hind legs and growled and bared their teeth at him for several minutes. . . .

One incident occurred at the intersection where Chris was killed. On June 14, 1996, Tony Van Buren, who lives directly across the street from the Davidson house, was out in his front yard in the evening when he heard dogs barking. He saw three Rottweilers forming a semicircle around two young children, who were approximately 3 to 5 years old. . . .

In addition to keeping and breeding German shepherds, defendant in 1995 began purchasing Rottweilers. Bernardi testified that defendant bought three from her, five from other kennels, and one from a breeder in Germany. Timothy Himelick testified that defendant bought two Rottweilers from him. Himelick's dogs were two years old, had been raised together as family dogs, and were very friendly. He sold them because he was moving, but several months later "repossessed" the dogs because defendant could not control the female. . . . When defendant got close to Himelick's female dog, the dog "went ballistic." When two children rode by on bicycles, defendant said, "One of these days I'm going [to] get even with them." And when asked by Himelick about a German shepherd that obviously had had a litter of puppies, defendant said her Rottweilers had eaten the pups. . . .

About 7 A.M. on April 24, 1997, Walls opened his front door to let his dog back into the house. Three Rottweilers had his dog backed into a corner of the porch. Walls' dog acted scared. Walls' dog slipped into the house, and the Rottweilers advanced toward Walls. He went back inside for his gun, and when he returned a few minutes later, they were gone. Walls went outside where he could see that the Rottweilers were back inside the Davidsons' fenced enclosure. . . .

Violet Wilson dropped her two younger sons, Chris, eleven, and Tramell, nine, off at the school bus stop shortly after 7:15 A.M. The bus stop was located near the residences of Tony Van Buren and defendant. While waiting for the bus, Tramell noticed that defendant's dogs were digging at the fence like they "really wanted to get out." When the dogs got out of the fence, they ran toward the boys, who climbed up into a tree in Van Buren's yard. The three dogs surrounded the tree and barked at the boys for several minutes before the biggest dog left and the other two followed it.

Chris wanted to get down out of the tree and see where the dogs had gone and what they were doing. Tramell urged him to stay in the tree, but Chris got down and looked around for the dogs.

When the school bus arrived at 7:30, no children were at the stop, but the driver noticed two book bags and a musical instrument had been left there. The driver saw Tramell up in a tree on Van Buren's lot. Tramell got out of the tree, ran to the bus stop, gathered up the bags and instruments, and got on the bus. As he got on, Tramell said something about Chris, which the driver thought sounded like Chris had run the dog home. The driver waited several minutes before repositioning the bus to let Chris know that he needed to hurry up. After moving the bus, the driver could see in the side mirror that there were three large black dogs down in the ravine. The dogs appeared to be fighting over something; they were jumping back and forth and thrashing their heads from side to side. One of the children on the bus said, "It looks like they have a rag doll." Then the driver realized that the dogs had Chris. The only movement of Chris' body was that caused by the thrashing motion of the dogs.

The driver began honking the bus horn in an effort to distract the dogs, and she radioed the dispatcher. There were approximately twenty children on the bus, and the driver then made an effort to divert their attention away from the ravine and to calm them.

When David Morrison, a sheriff's deputy, arrived, the bus driver told him that the boy and the dogs were in the ravine. As Morrison walked toward them, the dogs noticed him and moved quickly and steadily in his direction. Morrison could see that Chris was not moving. Morrison's shouts and gestures did not divert the dogs, which continued to move straight toward him with a large male in the lead. Morrison could see blood on the lead dog's face and forelegs. When the lead dog was approximately fifteen feet away from him, Morrison shot and killed him. One of the children on the bus testified that the lead dog had been the one at Chris' neck.

The other two dogs began to run away. Another officer, Sergeant Mataruso, who had just arrived, fired shots at the fleeing dogs. Morrison ran down into the ravine and found Chris. The boy had no pulse. The grass around his body was torn up, and there was a lot of blood spread around the area. Items of clothing, some ripped up, and shoes were scattered about.

When Deputy Shumate arrived, he saw a dead dog in the road. Mataruso told him that he had shot at, and probably wounded, another dog that had been seen running toward a house. Shumate went to the Davidson

house, where he found the wounded dog and killed it. Shumate told Mr. and Mrs. Davidson that a child had been attacked by their dogs; he then arrested them. They asked no questions about the identity or condition of the child. Inside the house, there was a dog confined in a large plastic pet carrier. Shumate testified that "the dog was growling, sort of barking, and moving the pet carrier all over the floor like it was trying to get out of the carrier to get at me." The third dog was shot and killed by a highway patrolman later in the day.

An autopsy revealed that Chris had died as a result of trauma from animal bites. There were many injuries, but those affecting the head and neck were immediately responsible for his death. The boy's esophagus and carotid artery were torn. His neck had been broken, and the bones splintered and crushed. . . . [T]he victim's neck was engulfed by the dog's mouth so that even the dog's back teeth left impressions in the tissue.

. . . The dogs that killed Chris were Rottweilers. The one killed by Morrison was an 80-pound male. The other two were females of 70 pounds and 54 pounds, respectively. . . .

Defendant told police that she let the dogs out about 6:30 A.M. on April 24, 1997. Then she took a sleeping pill and went to sleep on the living room couch. Later, when she was told that her dogs had attacked a boy, she said, "The dead one should be one of the Wilson boys." She said that the Wilson boys teased her dogs whenever they came around her property so that the dogs barked and got aggressive when the boys were in the area. She also said that the boy had been at the bus stop, and that is how she knew who was attacked.

Defendant told police that she and her husband had discussed putting a chain on the gate to the fenced enclosure because the dogs got out of that gate "all the time." There was no chain on the gate, however. At trial, defendant testified that after Bernardi watched one of the Rottweilers open the gate by lifting the latch, she put a padlock through the hole in the latch so that it could not be lifted. Defendant testified that after padlocking the latch, she had no more reports of the dogs getting out.

A videotape made by Deputies Snyder and Popovich shows that the Davidsons' back and side yards are enclosed by a 6-foot-tall chain link fence. The gate fastening device is a typical horseshoe-shaped hinged latch. In a horizontal position the arms of the latch are on either side of an adjacent upright fence post on which the next section of fence is attached. A locked padlock through the hole in the latch on the Davidsons' gate kept the latch in a horizontal position. The fence post along with the latch should have kept the gate closed, but the post was easily moved far enough from the vertical for the latch to slip past. On the videotape, Snyder opened and closed the "padlocked" gate without much effort. . . . The fence was installed in 1993.

Issue

Reckless second-degree murder, also known as depraved heart murder, was defined by the legislature as "the killing of a human being committed . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

Here, defendant argues that . . . the State's evidence establishes only that she failed to secure the dogs. She then argues that her conduct, as a matter of law, is not reckless second-degree murder. . . . Defendant's argument . . . is based on the State's failure to establish a "depraved heart scienter." It is difficult at times to follow her arguments, but she seems to imply that the State has failed to prove foreseeability, that she had knowledge the dogs would attack someone, let alone harm or kill someone. Thus, she argues the State failed to prove that her conduct was inherently dangerous to human life and that she was indifferent to that danger. In her view, her conduct did not rise to that level of reckless conduct manifesting an extreme indifference to the value of human life.

Reasoning

Here, defendant argues that all she did was let the dogs into the fenced area, take a pill, and go to sleep. This argument conveniently ignores significant aspects of her conduct that contributed to the tragic death of Chris. The State presented evidence that she selected powerful dogs with a potential for aggressive behavior and that she owned a number of these dogs in which she fostered aggressive behavior by failing to properly train the dogs. She ignored the advice from experts on how to properly train her dogs and their warnings of the dire results which could occur from improper training. She was told to socialize her dogs and chose not to do so. She ignores the evidence of the dogs getting out on numerous occasions and her failure to properly secure the gate. She ignored the aggressive behavior her dogs displayed toward her neighbors and their children. The State presented evidence that she created a profound risk and ignored foreseeable consequences that her dogs could attack or injure someone. The State is not required to prove that defendant knew her dogs would attack and kill someone. It was sufficient to prove that her dogs killed Chris and that she could have reasonably foreseen that the dogs could attack or injure someone as a result of what she did or failed to do.

Davidson was charged with reckless second-degree murder. The jury was instructed that in order to establish the charge, it would have to be proved that defendant killed Christopher Wilson "unintentionally but recklessly under circumstances showing extreme indifference to the value of human life." "Recklessly" was defined as "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." The jury also was instructed that it could consider the lesser included offense of involuntary manslaughter, either an unintentional killing done recklessly or an unintentional killing done in the commission of the offense of permitting a dangerous animal to be at large. The jury found that defendant's conduct involved an extreme degree of recklessness.

Holding

Here, the evidence, viewed in a light most favorable to the State, showed that defendant created an unreasonable risk and then consciously disregarded it in a manner and to the extent that it reasonably could be inferred that she was extremely indifferent to the value of human life. The evidence was sufficient to enable a rational fact finder to find Davidson guilty of reckless second-degree murder. Thus, the district court properly submitted the charge of reckless second-degree murder to the jury, and the evidence was sufficient to support the jury's verdict. The judgment of the district court is affirmed.

Questions for Discussion

1. What facts support Sabine Davidson's "indifference to the value of human life"?
2. Does the decision require her to know that the dogs would kill or was it sufficient that the killing was foreseeable? Could Davidson know or anticipate that the dogs were capable of killing a human being?
3. Do you believe that the defendant's recklessness created such an extreme threat to human life that the gravity of her crime was equivalent to intentional murder and that she was properly convicted of second-degree murder rather than a less serious category of homicide, such as negligent manslaughter?

You Decide

11.4 Michael Berry was charged with depraved heart murder. The defendant purchased a pit bull, Willy, from a breeder of fighting dogs. Berry trained Willy and entered the dog in "professional fights" as far away as South Carolina. Willy was described as possessing stamina, courage, and a particularly "hard bite." He was tied to the inside of a six-foot unenclosed fence so as to discourage access to the 243 marijuana plants that Berry was illegally growing in an area in the back of his house. Berry's next-door neighbor momentarily left her two-year-old child, James Soto, playing on the patio of her home. James apparently wandered across Berry's yard to the other side of Berry's home where he encountered Willy and was mauled to death. An animal control officer testified that pit bulls are considered "dangerous unless proved otherwise." Is Berry guilty of killing with an abandoned and malignant heart? See *Berry v. Superior Court,* 256 Cal. Rptr. 344 (Cal. Ct. App. 1989).

You can find the answer at www.sagepub.com/lippmanccl2e

You Decide

11.5 Following a party for his softball team at a club where he admitted drinking six beers, John Doub admitted that he struck two parked vehicles with his pickup truck. He immediately drove off because he was concerned that the police would detect that he had been drinking. Doub subsequently drank additional liquor and smoked crack cocaine; roughly two hours later, he collided into the rear of an automobile in which nine-year-old Jamika Smith was riding. The accident investigator determined that Doub's pickup was traveling at a rapid rate and drove "up on top of [the car]," driving it down into the pavement and propelling the automobile off the street and into a tree. Doub once again left the scene of the accident; he later denied involvement and claimed that his pickup had been stolen. Jamika Smith died fifteen hours later as a result of blunt traumatic injuries caused by the collision. Six months following these events, Doub admitted to a former girlfriend that prior to the collisions, he had an argument with his second ex-wife, had been drinking alcohol and smoking crack, and had subsequently caused the collision. Doub was charged and convicted of second-degree depraved heart murder

Kansas Statutes Annotated section 21–3402 (2003 Supp.) defines depraved heart murder as the killing of a human being committed "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." Would you convict Doub? See *State v. Doub,* 95 P.3d 116 (Kan. Ct. App. 2004).

You can find the answer at www.sagepub.com/lippmanccl2e

Felony Murder

A murder that occurs during the course of a felony is punished as murder. In *People v. Stamp,* Koory and Stamp robbed a store while armed with a gun and a blackjack. The defendants ordered the employees along with the owner, Carl Honeyman, to lie down on the floor so that no one "would get hurt" while they removed money from the cash register. Fifteen or twenty minutes following

the robbery Honeyman collapsed on the floor and was pronounced dead on arrival at the hospital. He was found to suffer from advanced and dangerous hardening of the arteries, but doctors concluded that the fright from the robbery had caused the fatal seizure. A California appellate court affirmed the defendants' conviction for felony murder and sentence of life imprisonment.[35]

This use of the felony murder to hold defendants liable for murder was criticized by another California appellate court, which observed that such a "harsh result destroys the symmetry of the law by equating an accidental killing . . . with premeditated murder."[36] Despite this criticism, the fact remains that "but for" the robbery, Honeyman would not have died. Severely punishing Koory and Stamp deters other individuals contemplating thievery and protects society. As you read this section of the textbook, consider whether the felony-murder rule is a fair and just doctrine.

The felony-murder doctrine, as previously noted, provides that any homicide that occurs during the commission of a felony or attempt to commit a felony is murder. This is true regardless of whether the killing is committed with deliberation and premeditation, intentionally, recklessly, or negligently. The intent to commit the felony is considered to provide the malice for the conviction of murder. The doctrine can be traced back to Lord Coke in the early 1600s and is illustrated by Judge Stephens's example that "if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony."[37]

This common law rule was not viewed as unduly harsh because all felonies in England were subject to the death penalty and it made little difference whether an individual was convicted of murder or of the underlying felony. Felony murder, however, came under increasing criticism in England as the number of felonies subject to the death penalty was gradually reduced. English lawmakers came to view felony murder as making little sense and abandoned the doctrine in 1957.

The 1794 Pennsylvania murder statute included, within first-degree murder, killings committed in the perpetration or attempt to perpetrate "any arson, rape, robbery or burglary." Killings committed in furtherance of other felonies under the Pennsylvania law were considered second-degree murder. The federal government along with virtually every state has continued to apply the felony-murder rule; only Ohio, Hawaii, Michigan, and Kentucky resist the rule. Four reasons are offered for the felony-murder rule:

- *Deterrence.* Individuals are deterred from committing felonies knowing that a killing will result in a murder conviction.
- *Protection of Life.* Individuals are deterred from committing felonies in a violent fashion knowing that a killing will result in a murder conviction.
- *Punishment.* Individuals who commit violent felonies that result in death deserve to be harshly punished.
- *Prosecution.* Prosecutors are relieved of the burden of establishing a criminal intent. The fact that a killing occurred during a felony is sufficient to establish first-degree murder. The imposition of liability on all the felons carrying out the crime provides an efficient method for incarcerating dangerous felons.

There is some question whether the felony-murder rule is an important tool in the fight against crime. The U.S. Supreme Court, for example, cites statistics indicating that only one-half of one percent of all robberies result in homicide.[38]

State felony-murder statutes generally classify killings committed in the perpetration or attempt to commit dangerous felonies, such as arson, rape, robbery, or burglary, as first-degree murder deserving life imprisonment or in states with the death penalty as a capital felony punishable with either life imprisonment or the death penalty. Killings committed in furtherance of other less dangerous felonies typically are not explicitly mentioned and are prosecuted under second-degree murder statutes that punish "all other kinds of murder that are not listed as first-degree murder."[39] Several states have statutes that punish as second-degree murder a killing that results from the commission or attempt to commit "any felony."[40]

Statutes that do not list specific felonies present courts with the challenge of determining which felonies are sufficiently serious to provide the foundation for felony murder. This has potentially severe consequences for a defendant. For example, in Pennsylvania, a killing during the "perpetration of a felony" is considered second-degree murder and is punished by life imprisonment. A court, however, may decide that the killing should not be punished as felony murder and that instead the killing should be punished as "other kinds of murder" under the third-degree murder statute, which is punishable by twenty years in prison.[41]

What felonies should serve as the foundation or predicate for felony murder? Judges have generally limited felony murder to "inherently dangerous felonies." One approach is to ask whether a particular felony can be committed "in the abstract" without creating a substantial risk that an individual will be killed. The other method is to examine whether the manner in which a particular felony was committed in the specific case before the court created a high risk of death.

The approach of the California Supreme Court is to ask whether the "underlying felony" can be committed without endangering human life. In *People v. Burroughs,* the defendant, a self-proclaimed healer of illness, treated a patient suffering from terminal leukemia with a special blend of lemonade, colored lights, and massage. As the victim's condition worsened, the defendant assured the victim that he would recover. After almost a month of this treatment, the victim suffered a brain hemorrhage and died. The evidence strongly suggested that the hemorrhage was the result of the massages administered by the defendant. The California Supreme Court ruled that the defendant's felonious unlicensed practice of medicine did not constitute an "inherently dangerous felony" because an unlicensed practitioner may be treating a common cold, sprained finger, or an individual who suffers from the delusion that he or she is President of the United States. The California Supreme Court accordingly reversed the defendant's conviction for felony murder. Clearly, an examination of the defendant's specific conduct would result in the conclusion that his unlicensed practice of medicine constituted a dangerous felony. Note that the prosecutor in *Burroughs* could have avoided the entire "dangerous felony" issue by charging the defendant with implied malice, second-degree murder rather than felony murder. Some courts seek to avoid the "dangerous felony" barrier by employing both approaches in determining whether a felony is "dangerous."[42]

The felony also must have "caused" the victim's death. An arsonist who sets fire to a hotel should anticipate that a firefighter or guest may die as a consequence of the fire. On the other hand, a Virginia court ruled that a felon was not liable for the death of his accomplice whose plane crashed while transporting a cache of illegal drugs. The crash resulted from bad weather and there was no indication that the pilot modified his customary flight plan or altitude to avoid detection.[43] Keep in mind that under the theory of accomplice liability, all the co-felons will be liable for a killing committed in furtherance of the felony that is the natural and probable result of the crime.

Felony murder can become complicated where a nonfelon, such as a police officer or victim, kills one of the felons or a bystander. In *Campbell v. State,* a police officer killed an armed fleeing felon who had robbed a taxicab driver. An unarmed co-felon was later apprehended by another officer and was charged with the first-degree murder of his co-felon. The Maryland Court of Appeals adopted the **agency theory of felony murder** that limits criminal liability to the acts of felons and co-felons and acquitted the defendant. This theory was first stated by the Massachusetts Supreme Judicial Court in *Commonwealth v. Campbell,* which held that a felon was criminally responsible only for acts "committed by his own hand or by some one acting in concert with him in furtherance of a common object or purpose" and that a felon is not liable for the acts of a "person who is his direct and immediate adversary . . . [who is] actually engaged in opposing and resisting him and his confederates."[44]

Other courts have adopted a **proximate cause theory of felony murder** that holds felons responsible for foreseeable deaths that are caused by the commission of a dangerous felony. In *Kinchion v. State,* the defendant acted as a lookout while his armed accomplice entered a store. The clerk shot and killed Kinchion's co-conspirator in self-defense, and Kinchion was convicted of first-degree felony murder. The Oklahoma court affirmed the defendant's conviction, explaining that his planning and carrying out the armed robbery "set in motion 'a chain of events so perilous to the sanctity of human life' that the likelihood of death was foreseeable."[45]

As you read about felony murder, consider whether this doctrine makes sense. Oliver Wendell Holmes, Jr., in his famous book, *The Common Law,* argues that if a felon stealing chickens accidentally kills a farmer, the defendant should be punished for reckless homicide rather than felony murder. Why should the prosecutor rely on felony murder rather than establishing the elements of implied malice second-degree murder? Note that Holmes argues that prosecuting the defendant for felony murder serves little purpose because few chicken thieves will be deterred from stealing chickens by a conviction of the thief for felony murder, and it would not occur to most chicken thieves to carry a weapon in any event.[46]

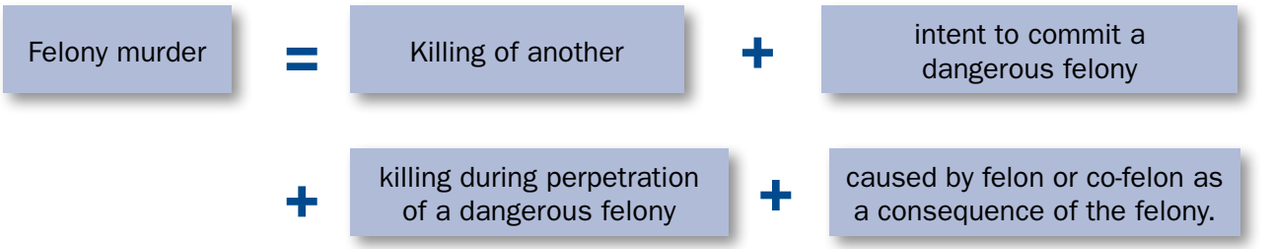
The Model Penal Code shares Holmes's point of view and limits the felony murder to killings that are recklessly committed during the course of certain felonies. Section 210.2 punishes, as a felony of the first degree, killings committed purposely or knowingly as well as killings that result from "circumstances manifesting extreme indifference to the value of human life." Reckless

indifference is presumed when a killing is committed during the commission, attempted commission, or flight from a robbery, sexual attack, arson, burglary, kidnapping, or felonious escape. The jury must find beyond a reasonable doubt that the defendant possessed a reckless indifference to human life.

The strength of the felony-murder doctrine is indicated by the fact that the Model Penal Code is only followed by a single state. Would you recognize felony murder if you were drafting a new state criminal code?

The next case in the textbook, *People v. Lowery,* asks whether a felon should be held criminally liable for the killing of an innocent bystander by a victim.

The Legal Equation



The Statutory Standard

The State of Washington provides that a killing committed in the course of, in furtherance of, or in flight from robbery, rape, burglary, and kidnapping constitutes first-degree murder subject to life imprisonment. Wash. Rev. Code § 9A.32.030. The second-degree murder statute contains the same text as the first-degree statute, but does not limit liability to specific felonies. Note the defenses listed in the Washington law.

Washington Revised Code
Section 9A.32.050. Murder in the Second Degree

(1) A person is guilty of murder in the second degree when:

(a) . . .

(b) He or she commits or attempts to commit any felony . . . and, in the course of and in furtherance of such crime or in the immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution . . . in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, . . . cause or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument . . . capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed . . .; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Should the defendant be held liable for a killing committed by a victim of his felony?

PEOPLE V. LOWERY, *687 N.E.2D 972 (ILL. 1997), OPINION BY: FREEMAN, C.J.*

Following a jury trial in the circuit court of Cook County, defendant, Antonio Lowery, was convicted of first-degree murder based on the commission of a felony, attempted armed robbery and two counts of armed robbery. The trial court sentenced defendant to thirty-five years' imprisonment for first-degree murder, twenty years for each of the two armed robberies, and twelve years for attempted armed robbery, to be served concurrently. On appeal, the appellate court reversed defendant's conviction and vacated his sentence for felony murder, holding that there was insufficient evidence to support defendant's conviction. We . . . now reverse the judgment of the appellate court.

Facts

On March 20, 1993, defendant was arrested and charged with two counts of armed robbery and one count of attempted armed robbery of Maurice Moore, Marlon Moore, and Robert Thomas. Defendant was also charged with the murder of Norma Sargent. In his statement to the police officers, defendant explained that he and his companion, "Capone," planned to rob Maurice, Marlon, and Robert. As Maurice, Marlon, and Robert walked along Leland Avenue in Chicago, defendant approached them, pulled out a gun, and forced Maurice into an alley. Capone remained on the sidewalk with Robert and Marlon. Once in the alley, defendant demanded Maurice's money. Maurice grabbed defendant's gun and a struggle ensued. Meanwhile, Capone fled with Robert in pursuit. Marlon ran into the alley and began hitting defendant with his fists. As defendant struggled with Maurice and Marlon, the gun discharged. The three continued to struggle onto Leland Avenue. Upon pushing Maurice down, defendant noticed that Maurice now had the gun. Defendant then ran from the place of the struggle to the corner of Leland and Magnolia Avenues, where he saw two women walking. As he ran, he heard gunshots and one of the women scream.

Defendant continued to run, and in an apparent attempt at disguise, he turned the Bulls jacket which he was wearing inside out. He was subsequently apprehended by the police and transported to the scene of the shooting, where Maurice identified him as the man who had tried to rob him.

At the conclusion of testimony and arguments, the jury found defendant guilty of first-degree murder under the felony-murder doctrine, two counts of armed robbery, and one count of attempted armed robbery. The appellate court reversed, holding that there was insufficient evidence to sustain a conviction for felony murder and remanded the cause for resentencing on defendant's armed robbery and attempted armed robbery convictions.

Reasoning

At issue in this appeal is whether the felony-murder rule applies where the intended victim of an underlying felony, as opposed to the defendant or his accomplice, fired the fatal shot which killed an innocent bystander. To answer this question, it is necessary to discuss the theories of liability upon which a felony-murder conviction may be based.

The two theories of liability are proximate cause and agency. In considering the applicability of the felony-murder rule where the murder is committed by someone resisting the felony, Illinois follows the "proximate cause theory." Under this theory, liability attaches under the felony-murder rule for any death proximately resulting from the unlawful activity—notwithstanding the fact that the killing was by one resisting the crime.

Alternatively, the majority of jurisdictions employ an agency theory of liability. Under this theory, "the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise." . . . Thus, under the agency theory, the felony-murder rule is inapplicable where the killing is done by one resisting the felony.

Defendant offers several arguments in an attempt at avoiding application of the proximate cause theory in this case. Initially, defendant urges this court to . . . adopt an agency theory of felony murder. We decline to do so. . . . Causal relation is the universal factor common to all legal liability. In the law of torts, the individual who unlawfully sets in motion a chain of events that in the natural order of things results in damages to another is held to be responsible for it.

It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events that were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death that by direct and almost inevitable sequence results from the initial criminal act. Thus, there is no reason why the principle underlying the doctrine of proximate cause should not apply to criminal cases. Moreover, we believe that the intent behind the felony-murder doctrine would be thwarted if we did not hold felons responsible for the foreseeable consequences of their actions. . . .

Defendant next argues that we should abandon the proximate cause theory because Illinois originally followed the agency theory of felony murder. Notwithstanding what the law held originally, . . . a felon is liable for the deaths that are a direct and foreseeable consequence of his actions.

Defendant further argues that the plain and clear language of the Illinois Criminal Code of 1961 requires adoption of the agency theory. . . . Defendant refers to section 9–1(a) of the Code, which states:

> (a) A person who kills an individual without lawful justification commits first-degree murder if, in performing the acts which cause the death:
>
> . . .
>
> (3) he is attempting or committing a forcible felony other than second-degree murder.

We fail to see how the plain language of the statute demonstrates legislative intent to follow the agency theory. To the contrary, the intent of the legislature is an adherence to the proximate cause theory. The legislative committee comments to section 9–1(a)(3) state that "it is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant, . . . or even by a third person trying to prevent the commission of the felony."

It is the inherent dangerousness of forcible felonies that differentiates them from non-forcible felonies. As noted in the committee comments of the felony-murder statute, "it is well established in Illinois to the extent of recognizing the forcible felony as so inherently dangerous that a homicide occurring in the course thereof, even though accidentally, should be held without further proof to be within the 'strong probability' classification of murder." This differentiation reflects the legislature's concern for protecting the general populace and deterring criminals from acts of violence. . . .

Based on the plain language of the felony-murder statute, legislative intent, and public policy, we decline to abandon the proximate cause theory of the felony-murder doctrine. . . .

Because we have decided to adhere to the proximate cause theory of the felony-murder rule, we must now decide whether the victim's death in this case was a direct and foreseeable consequence of defendant's armed and attempted armed robberies. The State . . . argues that defendant was liable for decedent's death because it was reasonably foreseeable that Marlon would retaliate against defendant. We agree. A felon is liable for those deaths which occur during a felony and which are the foreseeable consequence of his initial criminal acts.

In the present case, when defendant dropped the gun and realized that Marlon was then in possession of the weapon, he believed that Marlon would retaliate, and, therefore, he ran. If decedent's death resulted from Marlon's firing the gun as defendant attempted to flee, it was, nonetheless, defendant's action that set in motion the events leading to the victim's death. It is unimportant that defendant did not anticipate the precise sequence of events that followed his robbery attempt. We conclude that defendant's unlawful acts precipitated those events, and he is responsible for the consequences. . . . "[T]hose who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape." . . .

Defendant . . . argues that Marlon's act was an intervening cause because it was not foreseeable that Marlon would act as a vigilante and take the law into his own hands. It is true that an intervening cause completely unrelated to the acts of the defendant does relieve a defendant of criminal liability. However, the converse of this is also true: When criminal acts of the defendant have contributed to a person's death, the defendant may be found guilty of murder. . . . Marlon's resistance was in direct response to defendant's criminal acts and did not break the causal chain between defendant's acts and decedent's death. It would defeat the purpose of the felony-murder doctrine if such resistance—an inherent danger of the forcible felony—could be considered a sufficient intervening circumstance to terminate the underlying felony or attempted felony. . . .

Furthermore, we do not believe that Marlon acted as a vigilante, or that because of our holding, the citizenry will have license to practice vigilantism. A vigilante is defined as a member of "a group extra-legally assuming authority for summary action professedly to keep order and punish crime because of the alleged lack or failure of the usual law-enforcement agencies." Regardless of how unreasonable Marlon's conduct may, in hindsight, be perceived, his response was not based on a deliberate attempt to take the law into his own hands, but on his natural, human instincts to protect himself.

Defendant next argues that decedent's death falls outside the scope of felony murder because it did not occur during the course of defendant's armed robbery and attempted armed robbery. In support, he relies on section 7–4 of the Code, which states that justifiable use of force is not available to a person who provokes the use of force against himself unless he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Defendant maintains that he had "overtly retreated" from physical contact with Marlon and that Marlon's pursuit of defendant constituted a new conflict. The State, on the other hand, argues that defendant's election to flee fell within the commission of the armed and attempted armed robberies.

We must agree with the State. This court has consistently held that when a murder is committed in the course of an escape from a robbery, each of the conspirators is guilty of murder under the felony-murder statute, inasmuch as the conspirators have not won their way to a place of safety. . . .

Defendant asserts that he had reached a place of "legal safety" when he ran. We disagree. Defendant was attempting to escape when Marlon fired the shots at him. Apparently, defendant also did not believe he had "won a place of safety" as evidenced by his own act of turning his coat inside out to avoid detection before the police arrested him. Therefore, decedent's death falls within the scope of the felony-murder doctrine.

Defendant's final contention that Marlon was not legally justified in firing at defendant is misplaced. There is no claim that Marlon shot at defendant in self-defense or in an attempt to arrest him. Moreover, the proper focus of this inquiry is not whether Marlon was justified in his actions, but whether defendant's actions set in motion a chain of events that ultimately caused the death of decedent. We hold that defendant's actions were the proximate cause of decedent's death and the issue of whether Marlon's conduct was justified is not before this court.

Holding

In conclusion, we hold that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt under the felony-murder rule. . . . We therefore reverse the appellate court. . . . Accordingly, we remand the cause to the appellate court for consideration of defendant's remaining issues.

Questions for Discussion

1. Explain the difference between the agency and proximate cause theories of causality. Which theory favors the prosecutor in *Lowery?* Which theory favors the defense? What theory do you think is best to apply in *Lowery?*
2. Did Marlon fire the pistol in justifiable self-defense? Was Marlon's pistol shot an intervening act that should limit Lowery's criminal liability? Is Lowery correct when he argues that Marlon's act was "not foreseeable" in that he could not anticipate that Marlon would act as a "vigilante and take the law into his own hands"? Did Lowery set the events in motion that led to the victim's death?
3. Lowery argues that he clearly retreated, that the felony had been completed, and therefore he should not be held liable for felony murder. How does the court respond to this argument?
4. Would it be fair to hold Capone liable for felony murder, particularly given Marlon's inaccurate marksmanship? Would you hold Capone liable in the event that Marlon shot and killed Lowery in self-defense?

You Decide

11.6 John Malaske was convicted of second-degree felony murder for providing vodka to his underage, eighth-grade sister, knowing that she planned to share the alcohol with her friends. One of her friends later drank to excess, passed out, and died of alcohol poisoning. The Oklahoma second-degree murder statute provides that a felony "must be inherently or potentially dangerous to human life, inherently dangerous in light of the facts and circumstances surrounding both the felony and the homicide, or potentially dangerous in light of the facts and circumstances surrounding both the felony and the homicide."

The Oklahoma Court of Criminal Appeals ruled that furnishing alcohol to a minor who is under twenty-one is a "potentially dangerous" felony and that Malaske was legally liable for felony murder. The court held that the offense was not completed upon the delivery of the alcohol. It reasoned that minors are in a "protected class" and the prohibition on providing alcohol is intended to prevent juveniles from drinking to excess and endangering themselves and others. The dissent pointed out that alcohol does not pose an inherent threat to human life and is fully available in stores to adults. The dissent concluded that this is the "ultimate version of the extremists' blame game," and that Malaske should not be branded a murderer as a result of the poor judgment of juveniles. Was providing alcohol to the defendant's underage sister a felony that is dangerous to human life? Should felony murder be limited to felonies such as robbery, rape, arson, burglary, and kidnapping? How did the defendant's act cause the death of the young juvenile victim? Do you agree with the dissent that the "imposition of liability for unintended deaths erodes the relationship between criminal liability and moral culpability"? See *Malaske v. State,* 89 P.3d 1116 (Okla. Crim. App. 2004).

You can find the answer at www.sagepub.com/lippmanccl2e

You Decide

11.7 Sanexay Sophophone and three other individuals broke into a house in Emporia, Kansas. Police officers responded to a call from residents and spotted four individuals leaving the back of the house. They shined a light on the suspects and ordered them to stop. An officer ran down Sophophone, handcuffed him, and placed him in a police car.

Another officer chased Somphone Sysoumphone. Sysoumphone crossed railroad tracks, jumped a fence, and

then stopped. The officer approached with his weapon drawn and ordered Sysoumphone to the ground and not to move. Sysoumphone complied with the officer's command but, while lying face down, rose up and fired at the officer, who returned fire and killed him. Sophophone was charged with conspiracy to commit aggravated burglary, obstruction of official duty, and felony murder. . . . The question of law before the Kansas Supreme Court is whether Sophophone can be convicted of felony murder for the "killing of a co-felon not caused by his acts but by the lawful acts of a police officer acting in self-defense in the course and scope of his duties in apprehending the co-felon fleeing from an aggravated burglary." The Kansas Supreme Court held that the "overriding fact . . . is that neither Sophophone nor any of his accomplices 'killed' anyone. . . . We believe that making one criminally responsible for the lawful acts of a law enforcement officer is not the intent of the felony-murder statute." The dissent pointed out that the rationale for felony murder is that it serves as a general deterrent. Potential felons will be hesitant to engage in criminal activity if they realize that they risk being convicted of first-degree murder in the event that a death occurs during the commission of a felony. "Sophophone set in motion acts which would have resulted in the death or serious injury of a law enforcement officer had it not been for the highly alert law enforcement officer." This "could have very easily resulted in the death of a law enforcement officer . . . [and] is exactly the type of case the legislature had in mind when it adopted the felony-murder rule. . . . It does not take much imagination to see a number of situations where a death is going to result from an inherently dangerous felony and the majority's opinion is going to prevent the accused from being charged with felony murder." What is your view? Should the Kansas court use the agency or proximate cause theory? See *State v. Sophophone*, 79 P.3d 70 (Kan. 2001).

You can find the answer at www.sagepub.com/lippmanccl2e

Corporate Murder

For an international perspective on this topic, visit the study site.

Should a corporation be held liable for murder? In 1980, the Ford Motor Company was prosecuted for reckless homicide stemming from the 1978 death of three Indiana teenagers. The three were burned to death when their 1972 Ford Pinto was hit from behind by a van. Prosecutors charged that Ford was aware that the Pinto's gasoline tanks were in danger of catching fire when impacted by a rear-end collision. Ford was alleged to have decided that fixing the problem or recalling the Pinto would deeply cut into profits and decided that it would be less expensive to pay any damage awards that might result from civil suits filed by consumers. By 1977, the Pinto no longer was able to meet tough federal safety standards and, in late 1978, Ford recalled 1.5 million 1971–1976 Pinto sedans. Unfortunately, this recall was not issued in time to save the lives of the three victims. Ford was acquitted in a jury trial in March 1980.[47]

In 1999, A Florida jury found airline maintenance company SabreTech guilty of contributing to the 1996 crash of ValuJet Flight 593, an accident that resulted in the death of 110 passengers. The company allegedly had been responsible for placing prohibited hazardous materials on the ValuJet flight that exploded during flight. SabreTech was convicted on eight counts of mishandling hazardous materials and one count of failing to properly train employees.

In 2003, Motiva Enterprises pled "no contest" (a guilty plea for purposes of a particular prosecution) to one felony count of criminally negligent homicide and six misdemeanor counts of assault in the third degree. This plea arose out of a July 2001 explosion and fire at a company factory that resulted in the death of one employee and injury to six others. Prosecutors alleged that Motiva, a joint venture between Saudi Aramco and Royal Dutch Shell, ignored warnings and continued to operate the plant in order to maximize profits. The company's conviction resulted in a fine of $11,500 on the homicide charge and $5,750 for each of the assault charges for a total of $46,000, the maximum then permitted under Delaware law.

In 2005, the Far West Water and Sewer Company was convicted of the murder of a worker who died from toxic chemicals while working on an underground sewer tank. The company was fined 1.7 million dollars and required to pay restitution to the family of the dead worker.

These four cases illustrate that a corporation may be held liable for **corporate murder** in those cases in which conduct is performed or approved by corporate managers or officials. Of course, individual managers and executives may also be held criminally responsible. The extension of criminal responsibility to corporations is based on an interpretation of the term "person" in homicide statutes to encompass both natural persons and corporate entities.

A corporation clearly cannot be incarcerated and, instead, is punished by the imposition of a fine. It is reasoned that the threat of a fine will motivate corporate officials and individuals owning stock in the firm to ensure that the corporation follows the law. On the other hand, some would

argue that criminal responsibility is properly limited to the individuals who commit the crimes. A fine on a business hurts only the workers and stockholders who depend on strong corporate profits and creates a poor business climate that leads corporations to move their factories to other countries.

State v. Richard Knutson, Inc. is a prominent case involving corporate criminal liability. Ask yourself whether it serves any purpose to hold the corporation liable in this case or whether responsibility should be limited to corporate officials.[48]

Was the corporation guilty of murder?

STATE v. RICHARD KNUTSON, INC., *537 N.W.2D 420 (WIS. CT. APP. 1995), OPINION BY: ANDERSON, J.*

Facts

In the spring of 1991, Richard Knutson, Inc. (RKI) undertook the construction of a sanitary sewer line for the City of Oconomowoc. On May 20, 1991, while working in an area adjacent to some Wisconsin Electric Power Company power lines, a work crew attempted to place a section of corrugated metal pipe in a trench in order to remove groundwater. The backhoe operator misjudged the distance from the boom of the backhoe to the overhead power lines and did not realize he had moved the stick of the boom into contact with the wires. In attempting to attach a chain to the backhoe's bucket, a member of the crew was instantly electrocuted. . . . The jury found RKI guilty as charged. The trial court entered judgment, concluding that the evidence was sufficient to support the verdict of negligent homicide. The Wisconsin Statute (WS) reads as follows: "§ 940.10 STATS. Homicide by negligent operation of vehicle. Whoever causes the death of another human being by the negligent operation or handling of a vehicle is guilty of a Class E felony."

Issue

RKI raises the same challenges to WS section 940.10, STATS.—homicide by negligent operation of a vehicle statute—as it did in the trial court. The trial court held that section 940.10 covered acts by corporations. . . . The trial court decided that corporate liability was within the spirit of section 940.10, stating, "The purpose of the statute is to protect employees or anyone from the negligent conduct of another which may cause death. It should not matter that the 'another' is a person or corporation as long as the conduct is criminal. . . ."

On appeal, RKI insists that a corporation cannot be held accountable for homicide. RKI argues that "the statute uses the word 'whoever' and the correlative phrase 'another human being.' In the context of this sentence, 'whoever' necessarily refers to a human being. By its own terms, the statute therefore limits culpability for homicide by operation of a vehicle to natural persons." . . . The State argues that when used in the homicide statutes, the word "whoever" refers to natural or corporate persons. The State reasons that either can be liable for taking the life of "another human being."

Here, the statute does not provide a definition of "whoever." It is left to the reader to determine if "whoever" should be read expansively to include natural and artificial persons, or should be read narrowly and have its definition gleaned from its reference to the correlative phrase "another human being." Our task is to ascertain if the legislative intent is to include corporations within the class of perpetrators. This task is made more difficult by the legislature's use of the term "whoever" to identify the perpetrator of a crime and its failure to define that term. Why, when it rewrote the criminal code in 1955, the legislature chose to describe perpetrators with the ambiguous term "whoever" is an enigma. Another mystery is the deletion of any statutory language establishing corporate liability for criminal acts. This was eliminated, upon motion of an advisory committee member who was a house counsel for a large industrial corporation. . . .

Reasoning

Legislative inaction, in the face of repeated Wisconsin Supreme Court pronouncements that corporations can be held liable for criminal acts, convinces us that the legislature concurs in the Supreme Court's decisions. On two separate occasions the legislature significantly revised the homicide statutes; both times it is presumed that the legislature was aware that court decisions have held corporations criminally liable; and on both occasions, the legislature has elected not to undo corporate criminal liability. Our conclusion conforms to the modern trend of the law. A leading treatise on corporations acknowledges that a corporation may be held to answer for its criminal acts, including homicide. . . . The Model Penal Code also has several provisions holding corporations accountable for criminal behavior.

Wayne R. LaFave and Austin W. Scott summarize the persuasive policy considerations supporting

corporate criminal liability. Among those considerations is the factor that the corporate business entity has become a way of life in this country and the imposition of criminal liability is an essential part of the regulatory process. Another consideration centers on the premise that it would be unjust to single out one or more persons for criminal punishment when it is the corporate culture that is the origin of the criminal behavior. Also, the size of many corporations makes it impossible to adequately allocate responsibility to individuals. An additional consideration is the "indirect economic benefits that may accrue to the corporation through crimes against the person. To get these economic benefits, corporate management may shortcut expensive safety precautions, respond forcibly to strikes, or engage in criminal anticompetitive behavior." It has also been suggested that the free market system cannot be depended upon to guide corporate decisions in socially acceptable ways, and the threat of imposition of criminal liability is needed to deter inappropriate (criminal) corporate behavior.

RKI insists that Wisconsin has disregarded the modern trend of criminal law to hold corporations liable for criminal acts and that only individuals may be held liable. RKI's argument ignores reality. A corporation acts of necessity through its agents; therefore, the only way a corporation can negligently cause the death of a human is by the act of its agent—another human. Reading the statute to limit its coverage to perpetrators who are human, as suggested by RKI, skirts around the concepts of vicarious and enterprise liability. If a human was operating a vehicle within the scope of his or her employment when the death occurred, RKI's construction would permit the corporation to escape criminal prosecution simply because it is not a human being.

Holding

RKI's attempt to limit the class of perpetrators to natural persons ignores that . . . "finding moral responsibility and criminal liability does not depend on first determining whether an entity is a person." We are satisfied that the history of corporate criminal liability in Wisconsin prescribes the results reached. The construction of WS section 940.10, STATS., to include corporations is consistent with public policy and practice. In reaching this conclusion, we are cognizant of Justice Holmes' observation that, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Homicide by negligent use of a vehicle has three elements: "(1) that the defendant cause death (2) by criminal negligence (3) in the operation of a vehicle." . . . Of course, by necessity a corporation can only act through its employees, agents, or officers; therefore, it is the negligence of the employee that must rise to the level of criminal negligence.

Criminal negligence differs from ordinary negligence in two respects. First, the risk is more serious—death or great bodily harm as opposed to simple harm. Second, the risk must be more than an unreasonable risk—it must also be substantial. Criminal negligence involves the same degree of risk as criminal recklessness—an unreasonable and substantial risk of death or great bodily harm. The difference between the two is that recklessness requires that the actor be subjectively aware of the risk, while criminal negligence requires only that the actor should have been aware of the risk—an objective standard. . . .

The evidence permits the reasonable inference that RKI neglected to act with due diligence to ensure the safety of its employees as they installed sewer pipes in the vicinity of overhead electrical lines. RKI's management took no action to have the power lines de-energized or barriers erected; rather, management elected to merely warn employees about the overhead lines. A finder of fact would be justified in reasonably inferring that RKI had ample notice that the existence of overhead power lines would interfere with the job, and unless there was compliance with safety regulations, working in the vicinity of the overhead lines posed a substantial risk to its employees.

The evidence supports the conclusion that if RKI had enforced the written safety regulations issued by the federal government, had abided by its own written safety program, and had complied with the contract requirements for construction on Wisconsin Electric's property, the electrocution death would likely not have happened. The finder of fact was justified in concluding that RKI operated vehicles in close proximity to the overhead power lines without recognizing the potential hazard to its employees in the vicinity of the vehicles. The jury could reasonably find that RKI's failure to take elementary precautions for the safety of its employees was a substantial cause of the electrocution death.

Dissenting, *Brown, J.*

What this debate really comes down to is whether it is desirable that a court avoid the literal meaning of this statute. I acknowledge that there exists a tension between the language of the statute and the announced public policy goal by some of our citizenry that corporations be held to criminal liability for negligent deaths. And I reject the notion that we should never search for the "real" rule lying behind the mere words on a printed page. But when the statute's wording is so clear in its contextual rigidity, the statute has therefore generated an answer which excludes otherwise eligible answers from consideration. Unlike the majority, I take the clear wording of the statute seriously. Since the majority has seen fit to quote Justice Oliver Wendell Holmes, Jr., I too quote from a past justice of the nation's highest court. Justice Robert Jackson wrote: "I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress." My sentiments exactly.

Questions for Discussion

1. What facts formed the basis of Richard Knutson, Inc.'s conviction of negligent homicide?
2. List the corporate officials and employees who likely were negligent. Why did the prosecutor choose to prosecute the corporation rather than these individuals? Why did the prosecutor not charge Richard Knutson, Inc., with reckless homicide?
3. Summarize the argument in favor of extending the statute to cover corporations. Are you persuaded by the argument? Should states adopt statutes explicitly punishing corporate murder?
4. What is the purpose of holding Richard Knutson, Inc., criminally liable? Is the death of an employee better addressed through a civil suit seeking monetary compensation to the victim's family?

Cases and Comments

Corporate and Individual Liability. In Illinois, a corporation is criminally responsible for offenses "authorized, requested, commanded, or performed by the board of directors or by a high managerial agent acting within the scope of his employment." A corporation "is responsible whenever any of its high managerial agents possess the requisite mental state and is responsible for a criminal offense while acting within the scope of its employment." Evidence established that Stefan Golab died after ingesting poisonous cyanide fumes while working at a plant operated by Film Recovery and its sister corporation, Metallic Marketing. Golab reportedly trembled and foamed at the mouth before losing consciousness. The fumes were created by a process used to remove silver from used x-ray and photographic film. The air inside the plant reportedly was foul and breathing was difficult and painful. Workers experienced dizziness, nausea, headaches, and vomiting. The plant workers were not informed that they were working with cyanide or of the danger of breathing cyanide gas, and the ventilation was inadequate. Workers were neither provided with safety instructions nor protective clothing. Steven O'Neil, Charles Kirschbaum, and Daniel Rodriquez were responsible for operating the plant, were convicted of Golab's murder, and were sentenced to imprisonment for twenty-five years. O'Neil and Kirschbaum were also each fined $10,000. Murder requires knowingly performing an act or acts that create a strong probability of death or great bodily harm.

Film Recovery and Metallic Marketing were convicted of involuntary manslaughter and were each fined $10,000. Involuntary manslaughter requires the reckless performance of an act or acts that are likely to cause death or great bodily harm.

An Illinois appellate court reversed and remanded the conviction of the individual defendants to the trial court on the grounds that their conviction for murder was inconsistent with the finding that Film Recovery and Metallic Marketing were guilty of involuntary manslaughter. Why are these verdicts inconsistent? See *People v. O'Neil,* 550 N.E.2d 1090 (Ill. App. Ct. 1990).

See more cases on the study site: People v. O'Neil, *www.sagepub.com/lippmanccl2e*

You Decide

11.8 In 1983, an employee at Pyro Science Development Corporation, a fireworks manufacturer, plugged a fan into an electric outlet, generating sparks that caused a fire and explosion, killing one plant employee and injuring several others. Cornellier was director of operations at the plant and was charged and convicted of homicide by reckless conduct. Reckless conduct is defined under Wisconsin law as an act that creates a "situation of unreasonable risk and high probability of death . . . and which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating injury." Cornellier was allegedly manufacturing fireworks without a permit, in a factory that did not meet safety requirements. Three weeks prior to the explosion, Cornellier had been convicted of six violations of safety ordinances at a nearby plant and was advised that there were "high risks" of danger at the plant at which the accident occurred.

Following the explosion, the U.S. Department of Labor found nine separate violations of federal safety standards at the plant, including a lack of adequate precautions against the ignition of flammable vapors, the failure to provide a safe avenue of escape from the building, a mishandling of explosive materials in a fashion hazardous to life, and a failure to protect employees from explosion and fire. The Wisconsin court stressed that gross negligence could result from a failure to fulfill a duty to safeguard workers, as well as from an affirmative act. Judge Eich stressed that Cornellier's failure to provide safe storage of explosive materials and a safe electrical system substantially contributed to producing the employee's death. Can Cornellier be held criminally liable for a failure to act to correct the safety hazards at the plant? See *Cornellier v. Black,* 425 N.W.2d 21 (Wis. Ct. App. 1988).

You can find the answer at www.sagepub.com/lippmanccl2e

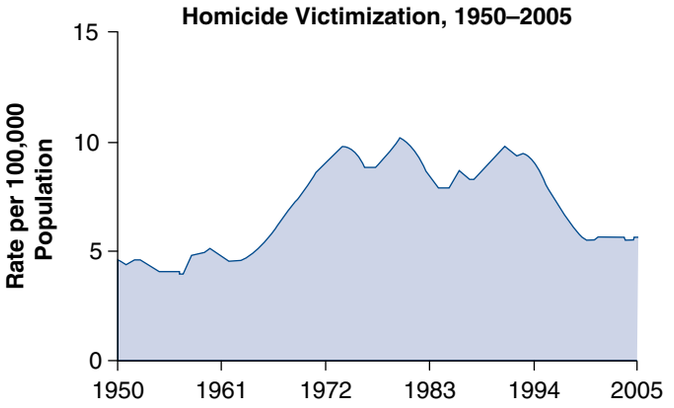
Manslaughter

Manslaughter comprises a second category of homicide and is defined as an unlawful killing of another human being without malice aforethought.

The common law distinction between voluntary manslaughter and the less severe offense of involuntary manslaughter continues to appear in many state statutes. Other statutes distinguish between degrees of manslaughter, and a third approach provides for a single offense of manslaughter. Voluntary manslaughter is the killing of another human being committed in a sudden heat of passion in response to adequate provocation. Adequate provocation is considered a provocation that would cause a reasonable person to lose self-control. Involuntary manslaughter is the killing of another human being as a result of criminal negligence. Criminal negligence involves a gross deviation from the standard of care that a reasonable person would practice under similar circumstances.[49] Remember, as we discussed in Chapter 8, an unreasonable, but good-faith belief in the necessity of self-defense in many states is recognized as imperfect self-defense and is punished as manslaughter.

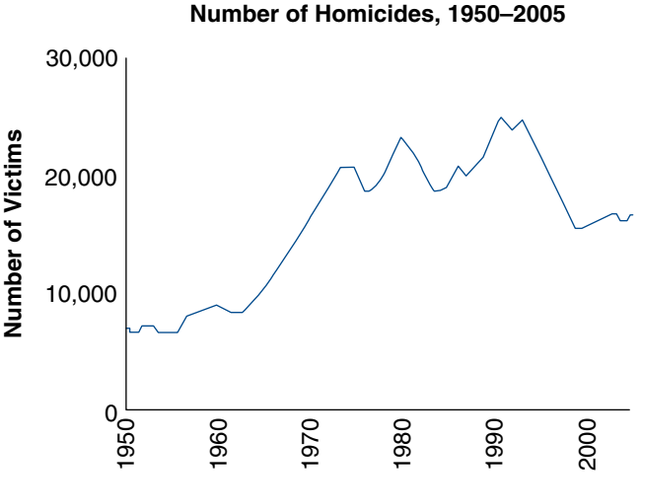
Figure 11.1 Crime on the Streets: Homicide Victimization, 1950–2005

- Homicide rates recently declined to levels last seen in the late 1960s.
- The homicide rate nearly doubled from the mid-1960s to the late 1970s.
- In 1980, it peaked at 10.2 per 100,000 population and subsequently fell to 7.9 per 100,000 in 1984.
- It rose again in the late 1980s and early 1990s to another peak in 1991 of 9.8 per 100,000.
- From 1992 to 2000, the rate declined sharply. Since then, the rate has been stable.



Source: FBI, Uniform Crime Reports, 1950–2005.

After falling rapidly in the mid- to late 1990s, the number of homicides began increasing in 1999 but remains at levels below those experienced in the early 1970s.



Source: FBI, Uniform Crime Reports, 1950–2005.

The demographic characteristics of homicide victims and offenders differ from the general population (based on data for the years 1976–2005):

- African Americans are disproportionately represented as both homicide victims and offenders. The victimization rates for African Americans were six times higher than those for whites. The offending rates for African Americans were more than seven times higher the rates for whites.
- Males represent seventy-seven percent of homicide victims and nearly ninety percent of offenders. The victimization rates for males were three times higher than the rates for females. The offending rates for males were eight times higher than the rates for females.
- Approximately one-third of murder victims and almost half the offenders are younger than the age of 25. For both victims and offenders, the rate per 100,000 peaks in the 18- to 24-year-old age group.
- Twenty-five- to thirty-four-year-olds are the only age group to witness an increase in homicide victimization rates since the late 1990s.
- Over one-quarter of the victims of gang-related killings are younger than the age of eighteen.

Voluntary Manslaughter

One function of criminal law is to remind us that we will be prosecuted and punished in the event that we allow our anger or frustration to boil over and assault individuals or destroy their property. Voluntary manslaughter seemingly is an exception to the expectation that we control our emotions. This offense recognizes that a reasonable person, under certain circumstances, will be provoked to lose control and kill. In such situations, it is only fair that an individual should receive a less serious punishment than an individual who kills in a cool and intentional fashion.

Voluntary manslaughter requires that an individual kill in a sudden and intense **heat of passion** in response to adequate provocation. Heat of passion is commonly described as anger but is sufficiently broad to include fear, jealousy, and panic.

The law of provocation is based on the reaction of the **reasonable person**, a fictional balanced, sober, and fair-minded human being with no physical or mental imperfections. *Adequate provocation* is defined as conduct that is sufficient to excite an intense passion that causes a reasonable person to lose control. The common law restricted adequate provocation to a limited number of situations: aggravated assault or battery, mutual combat defined as a fight voluntarily entered into by the participants, a serious crime committed against a close relative of a defendant, and one spouse observing the adultery of the other spouse. An individual who is overwhelmed by jealousy and anger after observing her boyfriend in an act of sexual interaction with another would not have a claim of heat of passion because the victim is not her husband. Keep in mind that the provocation must cause a reasonable person to lose control (objective component) and the defendant, in fact, must have lost control and killed in a heat of passion (subjective component).[50]

In some cases, courts have instructed jurors that they possess discretion to determine whether an event provides adequate provocation. This certainly seems preferable to limiting provocation to acts that were viewed as provocative by common law judges in England. On the other hand, this may lead to controversy concerning questions such as whether a nonviolent homosexual advance constitutes adequate provocation.[51] In a famous English case, the court ruled that an impotent individual was not reasonably provoked when he killed a prostitute who poked fun at his disability. The judges explained that the standard to be used was the hypothetical reasonable person rather than a reasonable person who was impotent.[52]

Jurists increasingly follow the Model Penal Code and are willing to recognize physical traits such as blindness or disease in determining whether an act constitutes reasonable provocation. However, judges are generally reluctant to broaden the traits of a reasonable person to include a defendant's moral views and attitudes. A Pennsylvania court, for instance, rejected a defendant's plea of voluntary manslaughter when he recounted that he was driven to kill a lesbian whom he witnessed making love as a result of his own mother's lesbianism and his anger at having been molested at a young age by a homosexual male.[53] This case illustrates the complexity of

considering an individual's views and attitudes. Should we recognize the cultural background of an immigrant parent from the Middle East who kills his daughter as a "matter of honor" after he observes her sexually interacting with her boyfriend?[54]

The defense of sudden heat of passion is unavailable if a reasonable person's passion would have experienced a **cooling of blood** between the time of the provocation and the time of killing. Some common law courts followed an ironclad rule that limited the impact of provocation to twenty-four hours. The modern approach is to view the facts and circumstances of a case and to determine whether a reasonable person's "blood would have cooled" and whether the defendant's "blood had cooled." One court recognized provocation lasting for more than twenty-four hours in the case of a defendant who had been informed that his father-in-law had raped the defendant's wife.[55] In a frequently cited case, the victim was sodomized while unconscious. The perpetrator spread news of the defendant's victimization throughout the community and subjected the victim to what the victim viewed as humiliating comments and embarrassment. The defendant boiled over in rage after two weeks of this harassment and killed the defendant. The court ruled that the cumulative impact of the harassment would not be taken into consideration and that too much time had passed to recognize involuntary manslaughter.[56]

Courts confront the challenge of determining whether an individual killed in a heat of passion as a result of the provocation or killed in a calm and intentional fashion. In *People v. Bridgehouse,* Marylou Bridgehouse informed her husband that while he was working two jobs to support his wife and their two sons, she had been having an affair with William Bahr for the past six or seven months. Bridgehouse later learned that Bahr and Marylou had a joint bank account and that Marylou had used his credit card to purchase a gift for Bahr, and Bridgehouse later discovered Bahr's clothes hanging in his closet. On the morning of the killing, Bridgehouse invited his wife to go skiing, but Marylou stated that she planned to go fishing with her mother and Bahr. Bridgehouse, a former sheriff, placed his service revolver in his belt and went over to his mother-in-law's house to allegedly get a pair of socks for his young son. Bridgehouse testified that he did not realize that Bahr was living there and, when encountering Bahr, lost control and only regained consciousness when he realized that his revolver was clicking on empty and Bahr was dead on the ground. A police officer testified that Bridgehouse was emotionally overwhelmed following the killing and told the officer that he wanted to "tell off" Bahr and that he "didn't want him around my children." Did Bridgehouse go to his mother-in-law's house with the intent to kill Bahr or was he taken by surprise and driven by emotion to kill? Could he have intended to kill Bahr and then found himself overwhelmed by emotion at the time that he arrived at his mother-in-law's home? Is there always a clear line behind intentional and premeditated killing and murder in the heat of passion?[57]

Voluntary Manslaughter Reconsidered

Voluntary manslaughter involves several "hurdles:"[58]

- *Provocation.* An individual must be *reasonably* and *actually* provoked and must *kill in a heat of passion.*
- *Cooling of Blood.* An individual must have *reasonably* and *actually* not "cooled off."

The question remains whether the law should recognize voluntary manslaughter. An individual who loses control and impulsively kills clearly poses a threat to society and might be viewed as dangerous as an individual who intentionally and calmly kills. Should we accept that a "reasonable person" can be driven to kill in the heat of passion and therefore should be subject to less severe punishment than other categories of killers?

In the next case, *Girouard v. State,* the court considers whether "words" may be sufficiently provocative to drive a reasonable person to kill. Courts generally have refused to recognize insulting and racist language as adequate provocation. However, there are decisions recognizing that "informational" words may constitute adequate provocation. For instance, in *State v. Flory,* the Wyoming Supreme Court recognized that a husband had been reasonably provoked by his wife's informing him that she had been raped by her father.[59]

The Legal Equation

Voluntary manslaughter = Killing another person + intent to kill + sudden heat of passion based on adequate provocation.

Can words constitute provocation?

Girouard v. State, *583 A.2D 718 (MD. 1991),* Opinion by: Cole, J.

In this case we are asked to . . . determine whether words alone are provocation adequate to justify a conviction of manslaughter rather than one of second-degree murder.

Facts

Steven S. Girouard and the deceased, Joyce M. Girouard, had been married for about two months on October 28, 1987, the night of Joyce's death. Both parties, who met while working in the same building, were in the army. They married after having known each other for approximately three months. The evidence at trial indicated that the marriage was often tense and strained, and there was some evidence that after marrying Steven, Joyce had resumed a relationship with her old boyfriend, Wayne.

On the night of Joyce's death, Steven overheard her talking on the telephone to her friend, whereupon she told the friend that she had asked her first sergeant for a hardship discharge because her husband did not love her anymore. Steven went into the living room where Joyce was on the phone and asked her what she meant by her comments; she responded, "[N]othing." Angered by her lack of response, Steven kicked away the plate of food Joyce had in front of her. He then went to lie down in the bedroom.

Joyce followed him into the bedroom, stepped up onto the bed and onto Steven's back, pulled his hair, and said, "What are you going to do, hit me?" She continued to taunt him by saying, "I never did want to marry you and you are a lousy fuck and you remind me of my dad." The barrage of insults continued with her telling Steven that she wanted a divorce, that the marriage had been a mistake, and that she had never wanted to marry him. She also told him she had seen his commanding officer and filed charges against him for abuse. She then asked Steven, "What are you going to do?" Receiving no response, she continued her verbal attack. She added that she had filed charges against him in the Judge Advocate General's Office (JAG) and that he would probably be court-martialed.

There was some testimony presented at trial to the effect that Joyce had never gotten along with her father, at least in part because he had impregnated her when she was fourteen, the result of which was an abortion. Joyce's aunt, however, denied that Joyce's father was the father of Joyce's child. In addition, Joyce lied about filing the charges against her husband.

When she was through, Steven asked her if she had really done all those things, and she responded in the affirmative. He left the bedroom with his pillow in his arms and proceeded to the kitchen where he procured a long handled kitchen knife. He returned to Joyce in the bedroom with the knife behind the pillow. He testified that he was enraged and that he kept waiting for Joyce to say she was kidding, but Joyce continued talking. She said she had learned a lot from the marriage and that it had been a mistake. She also told him she would remain in their apartment after he moved out. When he questioned how she would afford it, she told him she would claim her brain-damaged sister as a dependent and have the sister move in. Joyce reiterated that the marriage was a big mistake, that she did not love him, and that the divorce would be better for her.

After pausing for a moment, Joyce asked what Steven was going to do. What he did was lunge at her with the kitchen knife he had hidden behind the pillow and stab her nineteen times. Realizing what he had done, he dropped the knife and went to the bathroom to shower off Joyce's blood. Feeling like he wanted to die, Steven went back to the kitchen and found two steak knives

with which he slit his own wrists. He lay down on the bed waiting to die, but when he realized that he would not die from his self-inflicted wounds, he got up and called the police, telling the dispatcher that he had just murdered his wife.

When the police arrived they found Steven wandering around outside his apartment building. Steven was despondent and tearful and seemed detached, according to police officers who had been at the scene. He was unconcerned about his own wounds, talking only about how much he loved his wife and how he could not believe what he had done. Joyce Girouard was pronounced dead at the scene.

At trial, defense witness, psychologist Dr. William Stejskal, testified that Steven was out of touch with his own capacity to experience anger or express hostility. He stated that the events of October 28, 1987, were entirely consistent with Steven's personality, that Steven had "basically reach[ed] the limit of his ability to swallow his anger, to rationalize his wife's behavior, to tolerate, or actually to remain in a passive mode with that. He essentially went over the limit of his ability to bottle up those strong emotions. What ensued was a very extreme explosion of rage that was intermingled with a great deal of panic." Another defense witness, psychiatrist Thomas Goldman, testified that Joyce had a "compulsive need to provoke jealousy so that she's always asking for love and at the same time destroying and undermining any chance that she really might have to establish any kind of mature love with anybody."

Steven Girouard was convicted, at a court trial in the Circuit Court for Montgomery County, of second-degree murder and was sentenced to twenty-two years incarceration, ten of which were suspended. Upon his release, Petitioner is to be on probation for five years, two years supervised and three years unsupervised. . . . We granted certiorari to determine whether the circumstances of the case presented provocation adequate to mitigate the second-degree murder charge to manslaughter.

Issue

Girouard relies primarily on out-of-state cases to provide support for his argument that the provocation to mitigate murder to manslaughter should not be limited only to the traditional circumstances. . . . Steven argues that the trial judge did find provocation (although he held it inadequate to mitigate murder) and that the categories of provocation adequate to mitigate should be broadened to include factual situations such as this one.

The State counters by stating that although there is no finite list of legally adequate provocations, the common law has developed to a point at which it may be said there are some concededly provocative acts that society is not prepared to recognize as reasonable. Words spoken by the victim, no matter how abusive or taunting, fall into a category society should not accept as adequate provocation. According to the State, if abusive words alone could mitigate murder to manslaughter, nearly every domestic argument ending in the death of one party could be mitigated to manslaughter. This, the State avers, is not an acceptable outcome. Thus, the State argues that the courts below were correct in holding that the taunting words by Joyce Girouard were not provocation adequate to reduce Steven's second-degree murder charge to voluntary manslaughter.

Reasoning

Initially, we note that the difference between murder and manslaughter is the presence or absence of malice. Voluntary manslaughter has been defined as "an intentional homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool."

There are certain facts that may mitigate what would normally be murder to manslaughter. For example, we have recognized as falling into that group: (1) discovering one's spouse in the act of sexual intercourse with another; (2) mutual combat; (3) assault and battery. There is also authority recognizing injury to one of the defendant's relatives or to a third party, and death resulting from resistance of an illegal arrest as adequate provocation for mitigation to manslaughter. . . . Those acts mitigate homicide to manslaughter because they create passion in the defendant and are not considered the product of free will.

In order to determine whether murder should be mitigated to manslaughter we look to the circumstances surrounding the homicide and try to discover if it was provoked by the victim. Over the facts of the case, we lay the template of the so-called "Rule of Provocation." The courts of this State have repeatedly set forth the requirements of the Rule of Provocation:

1. There must have been adequate provocation;
2. The killing must have been in the heat of passion;
3. It must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool; and
4. There must have been a causal connection between the provocation, the passion, and the fatal act.

We shall assume without deciding that the second, third, and fourth of the criteria listed above were met in this case. We focus our attention on an examination of the ultimate issue in this case, that is, whether the provocation of Steven by Joyce was enough in the eyes of the law so that the murder charge against Steven should have been mitigated to voluntary manslaughter. For provocation to be "adequate," it must be "calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason." . . . The issue we must resolve, then, is whether the taunting

words uttered by Joyce were enough to inflame the passion of a reasonable man so that that man would be sufficiently infuriated so as to strike out in hot-blooded blind passion to kill her. Although we agree with the trial judge that there was needless provocation by Joyce, we also agree with him that the provocation was not adequate to mitigate second-degree murder to voluntary manslaughter.

Before the shooting, the victim had called the appellant "a chump" and "a chicken," dared the appellant to fight, shouted obscenities at him, and shook her fist at him. . . .

[W]ords can constitute adequate provocation if they are accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm. Clearly, no such conduct was exhibited by Joyce in this case. While Joyce did step on Steven's back and pull his hair, he could not reasonably have feared bodily harm at her hands. This, to us, is certain based on Steven's testimony at trial that Joyce was about 5'1" tall and weighed 115 pounds, while he was 6'2" tall, weighing over 200 pounds. Joyce simply did not have the size or strength to cause Steven to fear for his bodily safety. Thus, since there was no ability on the part of Joyce to cause Steven harm, the words she hurled at him could not . . . constitute legally sufficient provocation. . . .

Holding

Thus, with no reservation, we hold that the provocation in this case was not enough to cause a reasonable man to stab his provoker nineteen times. Although a psychologist testified to Steven's mental problems and his need for acceptance and love, we agree with the Court of Special Appeals speaking through Judge Moylan that "there must be not simply provocation in psychological fact, but one of certain fairly well-defined classes of provocation recognized as being adequate as a matter of law." The standard is one of reasonableness; it does not and should not focus on the peculiar frailties of mind of the Petitioner. That standard of reasonableness has not been met here. We cannot in good conscience countenance holding that a verbal domestic argument ending in the death of one spouse can result in a conviction of manslaughter. We agree with the trial judge that social necessity dictates our holding. Domestic arguments easily escalate into furious fights. We perceive no reason for a holding in favor of those who find the easiest way to end a domestic dispute is by killing the offending spouse. . . .

Questions for Discussion

1. Did Joyce's behavior constitute provocation that would cause a reasonable person to lose control or to kill? Was Steven provoked?
2. Do you believe that Steven killed in the "heat of passion" or in a cool and deliberate fashion?
3. Should the jury be permitted to freely determine whether Joyce's words and conduct constituted provocation that should reduce second-degree murder to voluntary manslaughter?
4. Some courts have recognized that "information" may constitute adequate provocation. Would Joyce's alleged filing of abuse charges against Steven qualify as "information" constituting adequate provocation?

Cases and Comments

Racial Speech and Heat of Passion. Rufus Watson, a twenty-year-old African American, was incarcerated for second-degree murder. He was involved in a homosexual relationship for several months with the decedent, Samples, a heavily muscled Caucasian inmate. The two became embroiled in a disagreement in front of a third inmate, Johnny Lee Wilson, shortly before the lights were to be dimmed for the night. Samples was verbally abusing Watson, calling him "N__" and alleging that he was too scared to fight. Samples then made derogatory and obscene comments about Watson's mother. Watson warned Samples, and Samples replied "Why don't you f_ me up if that's what you want to do. All you're gonna do is tremble, N__." Samples continued to verbally insult Watson, when Watson ran toward Sample's bunk and violently and repeatedly stabbed him with a kitchen paring knife.

The North Carolina Supreme Court ruled that words do not constitute adequate provocation sufficient to reduce the charge to voluntary manslaughter, but noted that a minority of states recognized that an individual who kills in response to a verbal assault might be considered to lack premeditation and held criminally responsible for second- rather than first-degree murder. The jury seemingly followed this approach on its own accord and convicted Watson of second-degree murder. The Supreme Court affirmed the trial court's refusal to instruct the jury that the informal code of conduct among inmates required Watson to stand up for himself or risk being viewed as weak and easily abused and raped. The Supreme Court pointed out that Watson could have demonstrated his toughness by fighting with his fists rather than with a knife. Is the inmate code of conduct important in determining whether Watson acted in the "heat of passion"? See *State v. Watson,* 214 S.E.2d 85 (N.C. 1975).

You Decide

11.9 Most courts no longer require a spouse to actually witness adultery. Merely being informed about a spouse's adultery may constitute adequate provocation. George Schnopps shot his wife after fourteen years of marriage. During the previous six months, the two had argued over Schnopps's allegation that his wife was involved with another man who was a "bum," and he threatened her with scissors, a knife, a shotgun, and a plastic pistol. In September 1979, Schnopps's wife informed him that she was moving to her mother's house with the three children. At one point, Schnopps became aware that his wife's alleged boyfriend employed a signal when he telephoned. Schnopps used the signal and his wife answered the phone, "Hello, lover." Schnopps's son shortly thereafter told Schnopps that his wife would not return home.

A few days prior to the killing, Schnopps threatened to make his wife suffer "as she had never suffered before." On October 12, 1979, a co-worker helped Schnopps purchase a gun and ammunition. Schnopps stated that he was "mad enough to kill" and that a "bullet was too good for her, he would choke her to death." On October 13, Schnopps called his wife and for the first time stated that he would consider leaving their apartment and arranged for his wife to meet him at the unit. A neighbor agreed to care for the couple's youngest child while the two met. Schnopps's wife refused to reconcile with him and stated that she was going to court and that Schnopps would be left with nothing and pointed to her crotch and said that "[y]ou will never touch this again, because I have got something bigger and better for it." Schnopps stated that these words "cracked" him and he wept that he had "nothing to live for" and that he would never love anyone else. His wife responded that she was "never coming back to you." He then shot her as she began to leave. The evidence indicated that Schnopps fired an additional bullet at his wife while she was on the floor. Schnopps allegedly stated that he wanted to "go with her" and shot himself. Schnopps made a number of statements on his way to the hospital including that he had shot his wife because she was cheating on him and that the "devil made me do it." Marylou died of three gunshot wounds to the heart and lungs fired from within two to four feet. The forensic evidence indicated that the killing occurred within a few minutes of her arrival at the apartment.

Friends and co-workers testified that Schnopps's physical and emotional health deteriorated during the separation from his wife. He began drinking, wept at work, was twice sent home early, and was diagnosed as suffering from a "severe anxiety state."

The jury was instructed that it could convict on manslaughter based on adultery, but returned a verdict of intentional and premeditated murder. The Massachusetts Supreme Court affirmed the verdict. Evidence indicated that following the killing, Schnopps suffered from a major depression in reaction to his wife's death. Can you clearly distinguish between deliberate and premeditated murder and murder in the heat of passion in this case? What verdict would you return? See *Commonwealth v. Schnopps,* 459 N.E.2d 98 (Mass. 1984).

You can find the answer at www.sagepub.com/lippmanccl2e

Involuntary Manslaughter

We now have reviewed voluntary manslaughter. Involuntary manslaughter is the second branch of manslaughter. Involuntary manslaughter involves the unintentional killing of another without malice and typically includes **negligent manslaughter**, the negligent creation of a risk of serious injury or death of another, as well as **misdemeanor manslaughter** (also referred to as unlawful-act manslaughter), the killing of another during the commission of a criminal act that does not amount to a felony. Some states, such as California, also provide for **vehicular manslaughter,** or the killing of another that results from the grossly negligent operation of an automobile or from driving under the influence of intoxicants.

Negligent Manslaughter

Negligent manslaughter arises when an individual commits an act that he or she is unaware creates a high degree of risk of human injury or death under circumstances in which a reasonable person would have been aware of the threat. Some courts require **recklessness**, meaning that a defendant must have been personally aware that his or her conduct creates a substantial risk of death or serious bodily harm. Other courts do not clearly state whether they require negligence or recklessness.

The Alabama criminal code section 13AA-6–4 provides that a person "commits the crime of criminally negligent homicide if he causes the death of another person by criminal negligence." The Missouri criminal code section 565.024 provides that the crime of involuntary manslaughter involves "recklessly" causing the death of another person. The Model Penal Code uses a negligence standard and holds individuals criminally responsible where they are "grossly insensitive to the

interests and claims of other persons in society" and their conduct constitutes a "gross deviation from ordinary standards of conduct."

At this point, it's likely you have correctly concluded that there is not always a clear line separating involuntary manslaughter from depraved heart murder. Depraved heart murder requires recklessness, and involuntary manslaughter in most states requires negligence. Depraved heart murder, as we have seen, involves the commission of an act that exhibits such a gross and obvious indifference to human life that the law implies malice aforethought. This type of recklessness may involve intentionally driving at an excessive and dangerous speed down a crowded street and indifferently killing a pedestrian. Involuntary manslaughter, in contrast, might involve a driver who confidently and negligently takes the wheel without adequate sleep and then falls asleep and kills a pedestrian. Can you explain the difference between the recklessness and negligence? The next case, *Commonwealth v. Walker,* asks you to determine whether the defendant was guilty of reckless involuntary manslaughter when he mixed a sleeping medication into the drink of a woman who later died.

Was the defendant guilty of involuntary manslaughter when he mixed drugs with alcohol?

Commonwealth v. Walker, *812 N.E.2D 262 (MASS. 2004),* Opinion by: Ireland, J.

A jury in the Superior Court convicted the defendant of involuntary manslaughter, assault with intent to rape, drugging for purposes of sexual intercourse, assault and battery by means of a dangerous weapon (four indictments), and mingling poison with drink with intent to kill or injure (four indictments). The indictments were based on three incidents involving four women in which the defendant invited the women to his apartment and served them drinks mixed with his prescription sleeping medication, temazepam. The drinks rendered all four women unconscious. At least one of the women was sexually assaulted while unconscious, and another died as a result of the combination of the drug and alcohol. The jury acquitted the defendant of a charge of rape.

On appeal, the defendant claimed that the manslaughter conviction must be reversed because there was insufficient evidence to establish that his conduct posed a high degree of likelihood that substantial harm would result to another person. . . . We conclude, that there was sufficient evidence for a rational jury to find the defendant guilty of involuntary manslaughter

Facts

The defendant was prescribed Restoril, a sleeping medication containing the drug temazepam. The defendant had prescriptions for Restoril filled through 1995 and 1996. He stored thirty milligram capsules of Restoril in his kitchen. The defendant's bottle of Restoril carried labels reading: (1) "May cause drowsiness. Alcohol may intensify this effect. Use care when operating a car or dangerous machinery"; and (2) "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed." The defendant knew that mixing Restoril with alcohol intensified the effects of both.

In 1998, at the time of trial, the defendant was seventy-one years old. Along with Valium and Xanax, temazepam is part of the benzodiazepine family of drugs. In addition to being used as a sleeping medication, temazepam is used to treat severe anxiety and panic attacks.

D.K. and E.R. were friends and neighbors. On the evening of June 7, 1995, they went to the defendant's apartment to socialize. The defendant prepared alcoholic drinks for the women. At the defendant's suggestion, D.K. put on a minidress. E.R. changed into a negligee. Before either woman had finished a second drink, they both became tired and groggy. D.K. was experiencing a sense of paralysis; she "knew [that] something was wrong" but was unable to "do anything about it." Shortly thereafter, both women lost consciousness.

When D.K. and E.R. awoke nine hours later in the defendant's bedroom, D.K. still had on the minidress, but her underpants were on the floor. The women felt sick and had trouble walking. The defendant drove them to D.K.'s apartment. Once home, D.K. telephoned the police and was told to go to a hospital. A blood screen was done at the hospital and tests revealed the presence of benzodiazepine in blood samples from both women. A sexual assault (or rape kit) examination of D.K. showed blood and a sperm stain on her underpants. Deoxyribonucleic

acid (DNA) analysis revealed that approximately twelve percent of African Americans, including the defendant, could have contributed to the stain.

The second incident occurred on June 14, 1996, when M.N., then thirty years old, visited the defendant at his apartment. During the visit, M.N. consumed clam chowder and what the defendant told her was fruit punch. M.N. then lost consciousness, but was aware of the sensation of someone touching and pounding at her rectal area. At trial, the defendant admitted that he served M.N. a "drink." Detective Sergeant John Courtney of the Randolph police department testified that during the investigation of the M.N. incident, the defendant told him that he mixed fruit punch, grapefruit, and vodka in M.N.'s drink.

According to M.N., on a prior visit to the defendant's apartment, although she advised him that she did not drink alcohol, he prepared a beverage for her containing Kahlua and milk. She testified that she became unconscious after consuming the drink, but could feel the defendant kissing her cheeks. No indictment was brought with respect to that incident. M.N. remembered the defendant's helping her down the stairs and taking her to her apartment. She felt drowsy and did not speak to the defendant.

She woke up at her home the next morning without her bra and wearing a different dress; her rectal area felt painful and "dirty." M.N. telephoned the defendant and accused him of raping her, to which he responded that he "tried," but did not "discharge" inside her. He told her not to go to a hospital and offered her $100, which she refused. M.N. went to a hospital that evening, where testing of her blood, while initially negative for benzodiazepine, later showed the presence of temazepam. A sexual assault examination revealed an abrasion on her external genitalia.

The final incident occurred on December 26, 1996. That evening, M.P., then fifty-eight years old, packed an overnight bag and left with the defendant. According to M.P.'s daughter, M.P. had some alcohol to drink before the defendant arrived. The following morning, in response to the defendant's 911 call, emergency personnel arrived at the defendant's apartment; M.P. was pronounced dead at the scene. The medical examiner testified that M.P. had died from a combination of temazepam and alcohol. Results of the DNA analysis on a rectal swab taken from M.P.'s body disclosed the presence of sperm cells and genetic material which was consistent with "the sum of DNA" from M.P. and the defendant.

Dr. David Robert Gastfriend, a psychiatrist and chief of addictive services at Massachusetts General Hospital, testified that thirty milligrams comprises a "full adult dose" of temazepam, but that, starting at age fifty years, a therapeutic dose for treating insomnia would be one-half that dose, or fifteen milligrams. He explained that, in persons aged fifty years or older, temazepam "can tranquilize the brain's sensor for smothering . . . depress the brain's drive to continue breathing," and thus, in such older persons, "there is a risk of essentially stopping breathing . . . with excessive dose." Dr. Gastfriend also testified that alcohol taken in conjunction with temazepam does not simply add to the effect of the drug, but multiplies its impact. As a result, patients who are prescribed temazepam are given strong warnings not to take it with alcohol. He opined that, based on the level of temazepam in M.P.'s blood (drawn approximately eight hours after she ingested temazepam), she likely had ingested two or more thirty-milligram temazepam pills the night before. Dr. Gastfriend further stated that temazepam causes amnesia, makes a person who is not used to it dizzy, tired, groggy, and unable to walk a straight line without staggering.

Dr. Alan David Woolf of Children's Hospital in Boston, the Massachusetts poison control system, and Harvard Medical School also testified. He said that the poison control system defines poison or poisoning as "an exposure to a drug or a chemical or a biological compound that injures a human." Dr. Woolf explained that, while benzodiazepines are among the regulated drugs that are "fairly safe," they are nevertheless categorized as "Class 4" substances, which means that benzodiazepines, or their compounds, can only be dispensed with a prescription from a properly licensed physician. Dr. Woolf said that benzodiazepines generate the third highest number of calls to the poison control center for poisoning by pharmaceuticals. He described their side effects as including loss of memory or impaired memory, impaired motor control, drowsiness, and impaired consciousness. He also stated that there is a "synergistic" effect when alcohol and temazepam are mixed together, meaning that each enhances the other's effects on the body. Moreover, Dr. Woolf opined that benzodiazepines are "never safe" when they are combined with alcohol because they may cause a "respiratory depression" or a "respiratory arrest," by making a person "forget" to breathe. Dr. Woolf added that "any either intentional or inadvertent exposure to any chemical [that] can result in injurious effects, or have the potential to induce injurious effects on the victim is considered a poison or poisoning."

The defendant testified at trial and denied any sexual contact with D.K., E.R., or M.N. He acknowledged that he made drinks for D.K., E.R., M.N., and M.P., but denied that he added any drug to what he served them. The defendant testified that he and M.P. had consensual intercourse, that he mixed a couple of drinks for her, and that she fell asleep on his couch. The next morning, finding M.P. unresponsive, the defendant dialed 911. He denied having anal intercourse with M.P. The defendant was convicted of manslaughter of M.P. on the theory

of wanton and reckless conduct; assault with intent to rape and drugging for sexual intercourse of M.N.; assault and battery by means of a dangerous weapon on all four victims; and mingling poison with drink with intent to kill or injure with respect to all four victims.

Issue

On appeal, the defendant argues that the evidence was insufficient to find him guilty of the crime of involuntary manslaughter, because it did not establish that his conduct posed a high degree of likelihood that substantial harm would result to another. The defendant concedes that, viewing the evidence in the light most favorable to the Commonwealth, the jury could have found that the defendant mixed his prescription medication, Restoril, into an alcoholic drink, which he gave to M.P. She drank it and died shortly thereafter from the combined effect of alcohol and the drug temazepam contained in Restoril. The defendant acknowledges that he knew there were at least two labels on the bottle of medication, one warning him that it was a Federal offense to give the drug to anyone else, and a second instructing him not to drink any alcohol when taking the medication. The defendant also concedes that the jury could have found that, on two other occasions (first involving D.K. and E.R. and then M.N.), the women had fallen asleep when he gave them a "similar mixture."

Relying on these facts, the defendant argues, however, that involuntary manslaughter could not be proved because Restoril is a legally prescribed medication that has numerous legitimate and "fairly safe" uses. Moreover, he argues, there was no label warning him that his conduct created a high degree of likelihood that substantial harm would result to another. . . .

Reasoning

We have often stated that, "involuntary manslaughter includes an unlawful homicide unintentionally caused by wanton and reckless conduct." . . . "Wanton or reckless conduct," in turn, "is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." . . . "Even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct . . . if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger." Thus . . . "conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice." . . .

Viewing the evidence and reasonable inferences from that evidence in the light most favorable to the Commonwealth, we conclude that the Commonwealth presented sufficient evidence for a rational jury to find the defendant guilty beyond a reasonable doubt of the involuntary manslaughter of M.P. The Commonwealth's evidence demonstrated that the defendant mixed his prescription medication in M.P.'s drink in four to six times the recommended dosage for a person over fifty years of age. The clearly affixed warning on the pill bottle stated that the medication was not to be taken with alcohol. The "synergistic" effect of mixing alcohol and prescription sleeping medication was explained by two experts at trial. Significantly, the defendant admitted at trial that he was aware of the warning label and that alcohol enhanced the effects of the medication. An ordinary person would have understood the admonition not to mix the sleeping pills with alcohol as a warning that the combination could be toxic, if not lethal, particularly in light of the fact that, on prior occasions, the defendant had administered temazepam in alcoholic beverages to women and watched its injurious effects take hold of them. In sum, the jury [was] entitled to conclude that the defendant's act in surreptitiously mixing multiple doses of his prescription sleeping medication with alcohol and serving the mixture to M.P. demonstrated an indifference to, and disregard of, the high degree of likelihood that substantial harm would result to her.

Holding

Both the warning label and the expert testimony reflected the concern that is all too well known and too often demonstrated in our society, namely that the combination of sleeping pills and alcohol can be deadly. . . . It is of "no consequence that the defendant may have meant no harm to the victim." . . . We reject as meritless the defendant's contention that, because he administered a prescribed medication to his victims, he cannot be considered aware of the risk involved, unlike, for example, the situation involving heroin, which has no currently accepted medical use and which has a high risk of death associated with its use. A person of ordinary intelligence would be aware that there are varying risks associated with all prescription medications. It is a matter of both common knowledge and common sense that a prescription is required to obtain certain medications precisely because they contain drugs that are not safe except when administered and supervised by a physician or other properly licensed practitioner. Even if we were to assume (which we do not) that an ordinary person was unaware of this fact, a label on the defendant's medication specifically conveyed the same point. The label informed the defendant not to give the drug to anyone else, a statement an ordinary person would have understood to mean that doing so may create a risk of harm. For the foregoing reasons, we conclude that there was sufficient evidence to support the defendant's conviction of involuntary manslaughter. . . .

Questions for Discussion

1. What was the standard used by the court for involuntary manslaughter, negligence, or recklessness? Did the defendant's act create a substantial threat of serious bodily harm or death?
2. Summarize Walker's defense. Why does the Massachusetts Supreme Judicial Court reject the defendant's argument?
3. How would you rule in this case?
4. Can you change the language on the drug label to result in the defendant's being found guilty of depraved heart murder rather than in voluntary manslaughter? What would be the result in the event that there was no warning label on the medicine?

Misdemeanor Manslaughter

An unintentional killing that results from an "unlawful act not amounting to a felony" is termed misdemeanor manslaughter. It may be more accurate to term this *unlawful-act manslaughter* because some states extend this to nonviolent felonies that do not trigger the felony-murder rule, as well as to acts that are not criminal but which are considered "unlawful." Unlawful is broadly interpreted to include "bad" or "immoral conduct." An individual, for instance, was convicted of manslaughter when he accidentally killed his girlfriend while attempting suicide, which is not a crime.[60]

The commission of the unlawful act provides a predicate that the defendant acted in a grossly negligent fashion and is properly held criminally liable for manslaughter. The California Penal Code defines involuntary manslaughter as an unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."[61]

A majority of states retain this rule. Some courts have limited the harshness of the doctrine by requiring a showing of proximate cause. For example, an individual who stole ten dollars from a church collection plate was not held criminally responsible for the death of a congregant who suffered a heart attack while chasing the thief. The Florida court reasoned that this was not the "kind of direct, foreseeable risk of physical harm that would support a conviction of manslaughter."[62] Other courts limit misdemeanor manslaughter to dangerous offenses.

A third approach is to distinguish between a *malum in se* offense, a crime that is "wrong in itself," as opposed to a *malum prohibitum* offense, a social welfare offense regulating areas such as professional licenses, motor vehicles, food service, and housing quality. A *malum prohibitum* offense provides the foundation for manslaughter only in those instances in which a defendant acted negligently. A cosmetologist who had not obtained a professional license was not held criminally liable for death caused by a poisoned facial treatment. The court reasoned that the facial treatment, rather than the failure to possess a license, caused the victim's death.[63]

Various states also provide for the offense of vehicular homicide. California punishes vehicular homicide that results in the death of another stemming from the grossly negligent operation of a motor vehicle, as well as vehicular homicide that results from the operation of a motor vehicle while intoxicated.[64] The Florida vehicular homicide provision encompasses killing caused by the reckless operation of a motor vehicle in a manner "likely to cause the death of, or great bodily harm to, another."[65]

The Model Penal Code rejects the misdemeanor manslaughter rule and merely punishes the reckless killing of another, an approach adopted by various states. The next case, *State v. Pray,* is an example of the debate over misdemeanor or unlawful-act manslaughter. This is similar to the continuing controversy over the felony-murder rule.

The Legal Equation

Should Pray be held responsible for Everett's death?

State v. Pray, *378 A.2D 1322 (ME. 1977),* Opinion by: Godfrey, J.

Facts

Robert Pray was convicted of manslaughter in the killing of Ralph Everett, Jr. The essential facts presented to the jury are these:

On October 3, 1975, Robert Pray, his friend Joan, and her brother, James Heald, later the State's primary witness, went to the Oasis Bar in Rockland. Ralph Everett was also there. During the evening both Pray and Everett became intoxicated and Everett twice fell down in the bar and landed on the back of his head.

Later that evening, James Heald and Robert Pray went outside and were standing on the porch of the Oasis when a car drove up and Everett got out. Everett came up the steps of the porch and, disregarding Heald's suggestion that he go home, walked straight at Robert Pray with his arms at his sides. Robert Pray testified that he was "scared" of Everett and knew that he "could be violent." Heald testified that Everett's appearance showed that there was going to be trouble. As Everett came close to Pray, Pray struck him against his chest with his left forearm. Everett staggered backward, fell off the porch and struck the back of his head on the pavement. He died of a fractured skull.

At the trial, the defense argued that earlier falls might have caused the fracture and that Pray acted in self-defense. The State sought and received jury instructions on the theories of voluntary manslaughter, criminally reckless involuntary manslaughter, and involuntary manslaughter as a result of death resulting from an unlawful act, namely, Robert Pray's striking of Everett with his forearm. The jury's verdict of guilty could have been founded on any one of those theories, including the theory of manslaughter resulting from an unlawful act.

Issue

The net effect . . . is to permit an unlawful act, whether *malum prohibitum* or *malum in se,* to be the basis of a conviction of involuntary manslaughter even when defendant's conduct in the particular circumstances may have created no perceptible risk of death.

Is the common law rule . . . consonant with sound principles of criminal law?

Reasoning

Unlawful-act involuntary manslaughter has been severely criticized. The flaw in the concept is that a person may be convicted of unlawful-act manslaughter even though the person's conduct does not create a perceptible risk of death. Thus, a person is punished for the fortuitous result, the death, although the jury never has to determine whether the person was at fault with respect to the death. The concept violates the important principle that a person's criminal liability for an act should be proportioned to his or her moral culpability for that act. The wrongdoer should be punished for the unlawful act and for homicide if he or she is at fault with respect to the death, but should not be punished for a fortuitous result merely because the act was unlawful.

The Model Penal Code abolishes the concept of unlawful-act manslaughter, and the modern trend in state homicide law is to follow this lead. Model Penal Code § 210.3. Under the modern view, unlawful acts which result in death are punished as homicide only when the acts involve a perceptible risk of death. Maine's new Criminal Code abolishes unlawful-act manslaughter and substitutes several types of reckless and negligent homicide. Me. Rev. Stat. Ann. tit. 17-A, §§ 10, 204, 205 (1976). This change represents legislative rejection of common law unlawful-act manslaughter and adoption of a homicide punishment scheme which makes the penalty commensurate with the defendant's culpability.

The rule in question is, of course, analogous to the so-called "felony-murder rule." In applying that rule even before adoption of the new Criminal Code, this Court had come to the position of requiring not merely a causal relationship between the felony being committed or attempted and the death, but also "proof beyond a reasonable doubt that the manner or method of its commission, or attempted commission, presents a serious threat to human life or is likely to cause serious bodily harm." We see no reason for not importing a similar requisite of perceptibility of risk of death or serious bodily harm as an element of unlawful-act involuntary manslaughter.

Holding

The common law concept of involuntary manslaughter resulting from an unlawful act can no longer be regarded as based on sound principles of criminal law and has not been incorporated in the new Maine Criminal Code. The doctrine should no longer be applied to sustain homicide convictions. . . . The concept is not based on sound principles of criminal law and has now been abolished by the legislature. Under these circumstances it would be unjust to apply the doctrine to sustain the homicide conviction of Robert Pray.

Questions for Discussion

1. What crime did Pray commit when he struck Everett? Had Everett not been seriously injured, would Pray likely have been charged with a criminal offense?
2. Was Pray the cause in fact of Everett's death? Was Pray the foreseeable, proximate cause?
3. Did Pray possess the intent to seriously injure or kill Everett? Absent the misdemeanor-manslaughter rule, was Everett's intent sufficient to hold him responsible for involuntary manslaughter?
4. At the time of Everett's death, Maine courts applied the common law misdemeanor-manslaughter rule. The rule was subsequently abolished by the Maine legislature. Explain why the court refused to apply the rule to hold Robert Pray criminally liable for involuntary manslaughter.
5. Assuming that Maine did not abolish the misdemeanor-manslaughter rule, how would you rule as the judge in this case?

See more cases on the study site: People v. Datema, *www.sagepub.com/lippmanccl2e*

Chapter Summary

The killing of another human being violates the fundamental right to life and is considered the most serious criminal offense. The common law gradually distinguished between murder (killings committed with malice aforethought), and the less serious crime of manslaughter (killings committed without malice aforethought).

We generally measure the beginning of human life from viability, the point at which a fetus is able to live independently from the mother. Death is measured by the brain death test, or the failure of the brain function.

Malice is an intent to kill with ill will or hatred. Aforethought means a design to kill. Malice aforethought is expressed when there is a deliberate intent to kill or implied where an individual possesses an intent to cause great bodily harm or an intent to commit an act that may lead to death or great bodily harm. Judges gradually expanded the concept of malice aforethought to include various forms of criminal intent.

There is no single approach to defining the law of murder or manslaughter in state statutes. The division of homicide into degrees is intended to divide killings by the "moral blameworthiness of the individual." This division is typically based on factors such as the perpetrator's intent, the nature of the killing, and the surrounding circumstances of the killing.

First-degree murder is the deliberate and premeditated killing of another with malice aforethought. An individual who is capable of devising a plan to take the life of another is considered a serious threat to society. Premeditation may be formed instantaneously and does not require a lengthy period of reflection. Thirty-five states recognize the death penalty. Killings viewed as deserving of capital punishment are categorized as capital first-degree murder or aggravated first-degree murder. Conviction results in the death penalty or life imprisonment. In non-death-penalty states, aggravated murder carries life imprisonment. A homicide qualifies as aggravated or capital murder when it is found to have been committed in a heinous or atrocious fashion.

Second-degree murder is comprised of intentional killings with malice aforethought that are not committed in a premeditated and deliberate fashion. Depraved heart murder includes killings resulting from a knowingly dangerous act committed with reckless and wanton disregard as to whether others are harmed. Felony murder entails the death of an individual during the commission of or attempt to commit a felony. This tends to be limited to dangerous felonies, and in various states felony murders are categorized as first-degree murder rather than second-degree murder.

Some state statutes explicitly provide for the criminal liability of corporations for unlawful killings. Absent an explicit provision for corporate liability, the term "person" in criminal statutes generally is interpreted to include corporations, which are legally considered to be "non-natural persons." A corporation is held liable for homicide where the offense is authorized, requested, commanded, or performed by the board of directors or by a high managerial agent acting within the scope of his or her employment. Corporate officers and employees may also be held individually liable.

Manslaughter is comprised of voluntary and involuntary manslaughter. Voluntary manslaughter is the killing of another in a sudden and intense heat of passion in response to an adequate provocation. Adequate provocation is defined as conduct that is sufficient to excite an intense passion that would cause a reasonable person to lose control. Only a limited number of acts are considered to constitute adequate provocation, but some judges have vested the discretion to determine provocation in jurors. The heat of passion is considered to have "cooled" after a reasonable period of time.

Involuntary manslaughter includes negligent manslaughter and misdemeanor manslaughter, also termed unlawful-act manslaughter. Negligent manslaughter involves the creation of a risk of the serious injury or death of another. Courts, in practice, do not clearly distinguish between a negligence and recklessness standard. Misdemeanor manslaughter involves a killing committed during the commission of a misdemeanor. Some states expand misdemeanor manslaughter to include nonviolent felonies and, for this reason, term this offense unlawful-act manslaughter.

Chapter Review Questions

1. Discuss the historical origins and development of criminal homicide into murder and manslaughter. Can you distinguish between murder and manslaughter?
2. Differentiate first-degree murder from first-degree capital or aggravated homicide.
3. What is the difference between first- and second-degree murder?
4. Define depraved heart murder.
5. Why does the law provide for the offense of felony murder? What are the arguments for and against the felony-murder rule?
6. Discuss the legal standards for holding a corporation liable for first-degree murder and for involuntary manslaughter. Is there a social benefit in holding corporations liable for homicide?
7. Define voluntary manslaughter.
8. What acts constitute adequate provocation? What must the defendant prove to establish heat of passion? At what point does a defendant's blood "cool"?
9. Should the law recognize the offense of voluntary manslaughter? Why not?
10. Discuss the difference between negligent homicide and misdemeanor manslaughter. Why is misdemeanor manslaughter termed unlawful-act manslaughter in some states?
11. Discuss the purpose of the various grades of murder and dividing homicide into murder and manslaughter. Why do we make all these technical distinctions between types of homicide?

Legal Terminology

agency theory of felony murder
aggravating factors
brain death test
capital murder
cooling of blood
corporate murder
criminal homicide
depraved heart murder
excusable homicide
felony murder
first-degree murder
grading
heat of passion
involuntary manslaughter
justifiable homicide
malice aforethought
manslaughter
misdemeanor manslaughter
mitigating circumstances
murder
negligent manslaughter
premeditation and deliberation
proximate cause theory of felony murder
reasonable person
recklessness
second-degree murder
vehicular manslaughter
voluntary manslaughter

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read about fetal homicide laws. As a state legislator, would you vote for a feticide statute?
2. Consider how the Wyoming murder of Matthew Shepard, in 1998, illustrates the law of felony murder.
3. Learn about Jack Kevorkian and the right to die.

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Burglary, Trespass, Arson, and Mischief

12

Did the defendant commit arson when he burned down the structure erected by homeless people?

The charges herein stem from an April 27, 2000, fire initiated at a structure erected by a group of homeless people for overnight lodging, located on 65th Street and Fourth Avenue, under the Gowanus Expressway overpass, in Brooklyn. The structure's two side walls consisted of two parallel existing fixed and unmovable fences. The remaining two walls consisted of carpets draped over a clothesline that extended between the two fences. A piece of plywood provided additional support to one side of the structure and buttressed it against strong winds. The entrance was covered by shower curtains and blankets, and the entire shelter was covered by a 30-by-50-foot blue tarp. The residents slept in sleeping bags or on mattresses, which were laid on carpeting on the ground. Electricity was supplied by an extension cord that was connected to a light socket at a nearby subway station. During the winter months, electric and kerosene space heaters were utilized to warm the structure. The central issue . . . is whether the structure constituted a "building" . . . which could be the subject of the crime of arson in the second degree.

Core Concepts and Summary Statements

Introduction

The safety and security of the home is a central value of American society, and the home historically has been protected against intruders. Crimes against habitation protect the peaceful enjoyment of the home and protect individuals against assaults on persons and property in the home.

Burglary

A. Burglary at common law is the breaking and entry of the dwelling house of another at night with the intention to commit a felony.
B. Burglary statutes no longer require a breaking, include a broad range of structures and vehicles, may be committed at night or day, and no longer require an intent to commit a felony.

Trespass

Trespass is the unauthorized entry onto the land or premises of another or remaining on the land or premises of another.

Arson

A. Arson at common law is the willful and malicious burning of the dwelling house of another.
B. Statutes no longer require a burning; even smoke damage and soot are sufficient. Arson may be committed against any building or vehicle.

Criminal Mischief

Criminal mischief involves damage or destruction of personal or real tangible property.

Introduction

The notion that the home is an individual's castle is deeply ingrained in the American character. After all, the United States is an immigrant society to which people flocked in order to seek a better life. A fundamental aspect of this dream was the ownership of a home.

The importance of the home was apparent from the early days of the country. The warrantless intrusion and quartering of British soldiers in the homes of the colonists was a central cause of the American Revolution. The Fourth Amendment to the Constitution was specifically adopted to insure that individuals were free from arbitrary searches of their homes and seizures of their

property. This amendment reminds us that a home is more than bricks and mortar and is valued as more than an economic investment. It is a safe and secure shelter where we are free to express our personalities and interests without fear of uninvited intrusions. What are your feelings when you think about your home?

In this chapter, we look at the common law offenses developed to protect an individual's dwelling and at the incorporation of these common law crimes in state statutes that cover a broad range of structures and vehicles. The criminal offenses covered in the chapter are:

- *Burglary.* Breaking and entering into a dwelling or other structure.
- *Trespass.* An uninvited intrusion onto an individual's property and dwelling.
- *Arson.* The burning of a dwelling.
- *Malicious Mischief.* The destruction of property or the home.

You should pay particular attention to how statutes have changed the common law of burglary and arson.

Burglary

Burglary at common law was defined as the breaking and entering of the dwelling house of another at night with the intention to commit a felony. Burglary was punished by the death penalty, reflecting the fact that a nighttime invasion of a dwelling poses a threat to the home, which is "each man's castle . . . and the place of security for his family, as well as his most cherished possessions."[1] Blackstone observed that burglary is a "heinous offense" that causes "abundant terror," which constitutes a violation of the "right of habitation" and which provides the inhabitant of a dwelling with the "natural right of killing the aggressor."[2] The crime of burglary protects several interests:

- *Home.* The right to peaceful enjoyment of the home.
- *Safety.* The protection of individuals against violent attack and fright within the home.
- *Escalation.* The prevention of a dangerous confrontation that may escalate into a fatal conflict.

In 1990, the U.S. Supreme Court noted that state statutes no longer closely followed common law burglary and that these statutes, in turn, did not agree on a common definition of burglary. This means that in thinking about burglary, you should pay particular attention to the definition of burglary in the relevant state statute. As you read this section, analyze how burglary has been modified by state statutes. In addition, consider whether we continue to need the crime of burglary. What does burglary contribute that is not provided by other offenses?[3]

Breaking

Common law burglary requires a "breaking" to enter the home by a trespasser, an individual who enters without the consent of the owner. A breaking requires an act that penetrates the structure, such as breaking a window or pushing open an unlocked door. Permanent damage is not required; the slightest amount of force is sufficient. Why did the common law require a breaking? Most commentators conclude that this requirement was intended to encourage homeowners to take precautions against intruders by closing doors and windows. In addition, an individual who resorts to breaking also typically lacks permission to enter, and the breaking is evidence of an "unlawful" or "uninvited" entry. A breaking may also occur through constructive force. This entails entry by fraud, misrepresentation, or threat of force; entry by an accomplice; or entry through a chimney.

Most statutes no longer require a breaking. Burglary is typically defined as an unlawful or uninvited entry (e.g., lacking permission to enter). Note that it is not burglary under this definition for an individual to enter a store that is open to the general public. Some courts have interpreted statutes to cover the entry into a store by arguing that an individual who enters a store while concealing that he or she plans to commit a crime has committed a fraud and therefore has entered unlawfully. Courts have ruled that breaking into an ATM machine or other structure "too small for a human being to live in or do business in is not a 'building' or 'structure' for the purpose of burglary."[4]

Entry

The next step after the breaking is "entry." This requires only that a portion of an individual's body enters the dwelling; a hand, foot, or finger is sufficient. Courts also find burglary when there is entry by an instrument that is used to carry out the burglary. This might involve reaching into a window with a straightened coat hanger to pull out a wallet or reaching an arm through a window to pour inflammable liquid into a home. In a recent case, an individual launched an aggressive verbal attack on his lover's husband while reaching his arm threateningly through the open door of the husband's motor home. A Washington appellate court determined that this was sufficient to constitute an intent to assault and a conviction for burglary.[5] Note the general rule is that it is not a burglary when an instrument is used solely to break the structure, such as tossing a brick through a window.[6]

Another point to keep in mind is that the breaking must be the means of entering the dwelling. You might break a window and then realize that the front door is open and walk in and steal a television. There is no burglary because the breaking is not connected to the entry. A burglary may also be accomplished constructively by helping a small, thin co-conspirator enter a home through a narrow basement window.

Some statutes provide that a burglary may be committed by "knowingly . . . remaining unlawfully in a building" with the required intent or "surreptitiously (secretly) remaining on the premises with the intent to commit a crime." In *Dixon v. State,* for example, the defendant entered a church during Sunday services, wandered into the church sanctuary, and stole money from the collection plate in the pastor's office. A Florida appellate court ruled that the defendant illegally entered the sanctuary and surreptitiously remained in the structure when he closed the door to the pastor's office during the robbery.[7]

The important point to keep in mind is that the entry for a burglary must be trespassory, meaning without consent. Note that stealing a computer from your own dorm room would not be a burglary. The essence of burglary is the unlawful interference with the right to habitation of another. In *Stowell v. People,* the Colorado Supreme Court observed that there is no burglary "if the person entering has a right to do so, although he may intend to commit and may actually commit a felony." Otherwise, a schoolteacher "using the key furnished to her . . . to re-open the schoolhouse door immediately after locking it in the evening, for the purpose of taking (but not finding) a pencil belonging to one of her pupils, could be sent to the penitentiary."[8]

Dwelling House

The common law limited burglary to a "dwelling house," a structure regularly used as a place to sleep. A structure may be used for other purposes and still constitute a dwelling so long as the building is used for sleep. The fact that the residents are temporarily absent from a summer cottage does not result in the building's losing its status as a dwelling. However, a structure that is under construction and not yet occupied or a dwelling that has been permanently abandoned is not considered a dwelling. The Illinois burglary statute provides that a dwelling is a "house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside."[9]

A dwelling at common law included the **curtilage**, or the land and buildings surrounding the dwelling, including the garage, tool shed, and barn. A recently decided Washington case held a defendant liable for a burglary when, with the intent to assault his former wife, he jumped over a six-foot wooden fence in the backyard of the house she shared with her current lover.[10]

Most statutes no longer limit burglaries to dwelling houses and typically categorize the burglary of a dwelling as an aggravated burglary. The California statute extends protection to "any house, room, apartment, . . . shop, warehouse, store, mill, barn, stable, outhouse, . . . tent, vessel . . . floating home, railroad car, . . . inhabited camper, . . . aircraft, . . . or mine."[11] Other statutes are less precise and provide that a burglary involves a "building or occupied structure, or separately secure or occupied portion thereof."[12]

Dwelling of Another

The essence of burglary under the common law is interference with an individual's sense of safety and security within the home. In determining whether the home is "of another," you need to

examine who resides in the dwelling rather than who owns the dwelling. For example, a husband who separates from his wife and moves out of the home that he owns with his spouse may be liable for the burglary of his former home. Also, an individual generally cannot burglarize a dwelling that he or she shares with another. A burglary of this dwelling is possible only when the individual enters into portions of the home under the exclusive control of his or her roommate with the requisite criminal intent.

The requirement that an entry be of the dwelling of another is not explicitly stated in most statutes. Despite the failure to include this language, you still cannot burglarize your own home because an entry must be unlawful, meaning without a legal right, and you clearly are entitled to enter your own home.

Nighttime

A central requirement of burglary at common law is that the crime be committed at night. The nighttime hours are the time when a dwelling is likely to be occupied and when individuals are most apt to be resting or asleep and vulnerable to fright and to attack. Perpetrators are also less likely to be easily identified during the nighttime hours. The common law determined whether it was nighttime by asking whether the identity of an individual could be identified in "natural light."

State statutes no longer require that a burglary be committed at night. However, a breaking and entering during the evening is considered an aggravated form of burglary and is punished more severely. States typically follow the rule that night extends between sunset and sunrise or from thirty minutes past sunset to thirty minutes before sunrise. English law defines nighttime as extending from six at night until nine in the morning.[13]

Intent

The common law required that individuals possess an intent to commit a felony within the dwelling at the time that they enter the building. An individual is guilty of a burglary when he or she enters the dwelling, regardless of whether he or she actually commits the crime or abandons his or her criminal purpose. The intent must be concurrent with the entry; it is not a burglary when the felonious intent is formed following entry.

Some judges recognize that individuals who enter a building are guilty of a burglary in the event that they develop a felonious intent after entering into a building and unlawfully break into a secured space, such as an office or dorm room.

Statutes have adopted various approaches to modifying the common law intent standard. Pennsylvania requires an intent to commit a crime.[14] California broadens the intent to include any felony or any misdemeanor theft.[15] The expansion of the intent standard is justified on the grounds that an intrusion into the home is threatening to the occupants regardless of whether the intruder's intent is to commit a felony or misdemeanor.

Aggravated Burglary

Burglary is typically divided into degrees. Aggravated first-degree burglary statutes generally list various circumstances as deserving enhanced punishment, including the nighttime burglary of a dwelling, the possession of a dangerous weapon, or the infliction of injury to others. Second-degree burglary may include the burglary of a dwelling, store, automobile, truck, or railroad car. The least serious grade of burglary typically involves entry with the intent to commit a misdemeanor or nonviolent felony.

Arizona punishes as first-degree burglary the entering of or remaining in a residential or nonresidential structure with the intent to commit a felony or theft while knowingly possessing explosives or a deadly weapon or dangerous instrument. The burglary of a residential structure is a second-degree burglary, and the least serious form of burglary involves a nonresidential structure or fenced-in commercial or residential yard.[16]

Most states also prohibit possession of burglar tools. Idaho punishes as a misdemeanor the possession of a "picklock, crow, key, bit, or other instrument or tool with intent feloniously to break or enter into any building or who shall . . . knowingly make or alter any key . . . [to] fit or open the lock of a building, without being requested so to do by some person having the right to open the same. . . ."[17]

Burglary is a distinct offense and does not merge into the underlying offense. An individual, as a result, may be sentenced for both a burglary and assault and battery or for both a burglary and larceny. Pennsylvania, however, provides that a burglary merges into the offense "which it was his intent to commit after the burglarious entry" unless the additional offense was a serious felony.[18]

The Statutory Standard

The Massachusetts burglary statute incorporates both the breaking and entry and the statutory burglary approaches to burglary. Compare and contrast the following articles.

Section 14: Whoever breaks and enters a dwelling house in the night time with intent to commit a felony, or whoever, after having entered with such intent, breaks such dwelling house in the night time, any person being then lawfully therein, and the offender being armed with a dangerous weapon at the time of such breaking or entry, or so arming himself in such house, or making an actual assault on a person lawfully therein, shall be punished by imprisonment in the state prison for life or for any term of not less than ten years. . . .

Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. Whoever commits a subsequent such offense shall be punished by imprisonment in the state prison for life or for term of years, but not less than 20 years. The sentence imposed upon a person who, after being convicted of any offense mentioned in this section, commits the like offense, or any other of the offenses therein mentioned, shall not be suspended, nor shall he be placed on probation.

Section 15: Whoever breaks and enters a dwelling house in the night time, with the intent mentioned in the preceding section, or, having entered with such intent, breaks such dwelling house in the night time, the offender not being armed, nor arming himself in such house, with a dangerous weapon, nor making as assault upon a person lawfully therein, shall be punished by imprisonment in the state prison for not more than twenty years and, if he shall have been previously convicted of any crime named in this or the preceding section, for not less than five years.

Section 16: Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, or who attempts to or does break, burn, blow up or otherwise injures or destroys a safe, vault or other depository of money . . . or other valuables in any building, vehicle or place, with intent to commit a larceny or felony . . . shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.

Section 16A: Whoever in the night time or day time breaks and enters a building, ship, vessel or vehicle with intent to commit a misdemeanor shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months.

Section 17: Whoever, in the night time, enters without breaking, or breaks and enters in the day time, a building, ship, vessel, or vehicle, with intent to commit a felony, the owner or any other person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years. Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years or in the house of correction for not more than two and one-half years.

Do We Need the Crime of Burglary?

Do we really need burglary statutes? Why not just severely punish a crime committed inside a dwelling or other building?

The commentary to the Model Penal Code points out that punishment for burglary can lead to illogical results. An individual entering a store with the intent to steal an inexpensive item under some statutes would be liable for both burglary and shoplifting. On the other hand, an

individual who developed an intent to steal only after having entered the store would only be liable for shoplifting. Does this make sense?

In *State v. Stinton,* Stinton violated an order of protection issued by a judge that prohibited Stinton from harassing his former lover, Tyna McNeill. Stinton nevertheless entered and attempted to remove his personal property from the home the two formerly shared. He was held liable for the misdemeanor of violating the order of protection in addition to the felony of burglary for entering a dwelling with the intent to commit a crime. Stinton unsuccessfully argued that this unfairly transformed his violation of an order of protection into a burglary. Had he confronted McNeill on the street, Stinton would be held liable only for a misdemeanor. Do you agree with Stinton's contention?[19]

On the other hand, burglary statutes recognize that there clearly is a difference in the degree of fear, terror, and potential for violence resulting from an assault or theft in the home as opposed to an assault and theft on the street. Do burglary statutes require reform? Should we return to the common law definition of burglary? The Model Penal Code provides a reformed version of the law of burglary.

The next case, *Bruce v. Commonwealth,* challenges you to creatively apply the breaking and entering requirement to an unusual set of circumstances.

Model Penal Code

Section 221.1. Burglary

(1) A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portions thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

(2) Burglary is a felony of the second degree (maximum sentence of ten years) if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:

(a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or
(b) is armed with explosives or a deadly weapon.

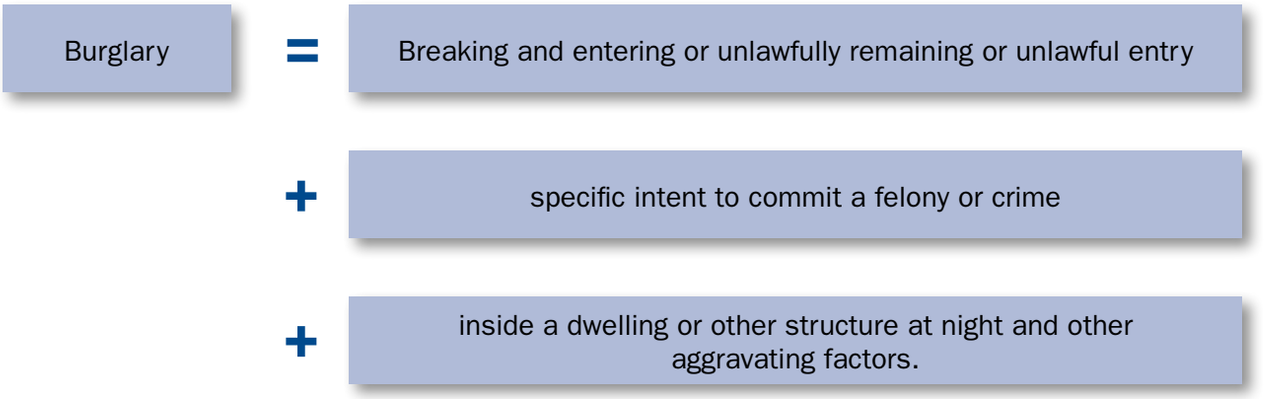
Otherwise, burglary is a felony of the third degree (a maximum sentence of five years). An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

(3) A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

Analysis

- A burglary is limited to an occupied building or structure. The building or structure need not be occupied at the precise moment of the burglary; the important point is that the structure is "normally occupied." There is no breaking and entering requirement. The Model Penal Code does not punish remaining unlawfully on the premises as burglary.
- The Model Penal Code does not include stores open to the public or motor vehicles or railcars.
- A burglary may be committed in a separate portion or unit of a building.
- A burglary involves an intent to commit a "crime" and is not limited to a felony. The burglary is aggravated when perpetrated at night or when it involves the infliction or attempted infliction of bodily harm or in those instances that the perpetrator is armed with explosives or a deadly weapon.
- Most burglaries are punished as felonies in the third degree. The burglary merges into the completed crime unless the underlying offense is a felony in the second degree (maximum sentence of ten years) or serious felony such as rape, violent robbery, or murder (maximum imprisonment for life).

The Legal Equation



Did the appellant break into the trailer?

Bruce v. Commonwealth, *469 S.E.2D 64 (VA. APP. 1996), Opinion by: Elder, J.*

Facts

Appellant and Deborah Bruce (Deborah), although married, lived in separate residences during late 1993. Deborah lived with the couple's son, Donnie Bruce, Jr. (Donnie), and Donnie's girlfriend at Greenfield Trailer Park in Albemarle County, Virginia. Although appellant stayed with Deborah at the residence during a period of time in September or October of 1993, his name was not on the lease, he was not given a key to the residence, and he did not have permission to enter the residence at the time of the alleged offense.

On December 5, 1993, at approximately 2:00 P.M., Deborah, Donnie, and Donnie's girlfriend left their residence. Earlier that morning, Donnie told appellant that Deborah would not be home that afternoon. Upon departing, Donnie and Deborah left the front door and front screen door closed but unlocked. The front door lacked a knob but had a handle, which allowed the door to be pulled shut or pushed open.

After Deborah, Donnie, and Donnie's girlfriend left their residence, a witness observed appellant drive his truck into the front yard of the residence and enter through the front door without knocking. Appellant testified, however, that he parked his truck in the lot of a nearby supermarket and never parked in front of the residence. Appellant stated that the front screen door was open and that the front door was open three to four inches when he arrived. Appellant testified that he gently pushed the front door open to gain access and entered the residence to look for Donnie.

While preparing to leave the residence, appellant answered a telephone call from a man with whom Deborah was having an affair. The conversation angered appellant, and he threw Deborah's telephone to the floor, breaking it. Appellant stated that he then exited through the residence's back door, leaving the door "standing open," and retrieved a .32 automatic gun from his truck, which was parked in the nearby supermarket parking lot. Appellant returned to the residence through the open back door. Appellant, who testified that he intended to shoot himself with the gun, went to Deborah's bedroom, lay on her bed, and drank liquor.

When Deborah, Donnie, and Donnie's girlfriend returned to their residence, appellant's truck was not parked in the front yard. Upon entering the residence, Donnie saw that someone was in the bathroom, with the door closed and the light on. When police arrived soon thereafter, they found appellant passed out on Deborah's bed and arrested him.

On May 24, 1994, a jury in the Circuit Court of Albemarle County convicted appellant of breaking and entering a residence, while armed with a deadly weapon, with the intent to commit assault. Appellant appealed to this court.

Issue

In order to convict appellant of the crime charged, the Commonwealth had to prove that appellant broke and entered into his wife's residence with the intent to assault her with a deadly weapon. Under the facts of this case, the Commonwealth satisfied this burden.

Reasoning

Breaking, as an element of the crime of burglary, may be either actual or constructive. . . . Actual breaking involves the application of some force, slight though it may be, whereby the entrance is effected. Merely pushing open a door, turning the key, lifting the latch, or resorting to other slight physical force is sufficient to constitute this element of the crime. "Where entry is gained by threats, fraud or conspiracy, a constructive breaking is deemed to have occurred." . . ."[A] breaking, either actual or constructive, to support a conviction of burglary, must have resulted in an entrance contrary to the will of the occupier of the house."

Appellant's initial entry into Deborah's residence constituted an actual breaking and entering. Sufficient credible evidence proved that appellant applied at least slight force to push open the front door and that he did so contrary to his wife's will. However, as the Commonwealth concedes on brief, appellant did not possess the intent to assault his wife with a deadly weapon at this time. . . . The Commonwealth therefore had to prove appellant intended to assault his wife when he reentered the residence with his gun.

We hold that the Commonwealth presented sufficient credible evidence to prove the crime charged. On the issue of intent, the jury reasonably could have inferred that the phone call from Deborah's boyfriend angered appellant, resulting in his destruction of the telephone and the formation of an intent to commit an assault with a deadly weapon upon Deborah. Viewed in the light most favorable to the Commonwealth, credible evidence proved that appellant exited the back door of the residence, leaving the door open, moved his truck to a nearby parking lot, and reentered the residence carrying a gun with the intent to assault Deborah.

Well-established principles guide our analysis of whether appellant's exit and reentry into the residence constituted an actual or constructive breaking. As we stated above, an "actual breaking involves the application of some force, slight though it may be, whereby the entrance is effected." . . . "In the criminal law as to housebreaking and burglary, [breaking] means the tearing away or removal of any part of a house or of the locks, latches, or other fastenings intended to secure it, or otherwise exerting force to gain an entrance, with criminal intent. . . ." Virginia, like most of our sister states, follows the view that "breaking out of a building after the commission of a crime therein is not burglary in the absence of a statute so declaring." . . . In this case, appellant exited the back door of the residence on his way to retrieve the gun from his truck. In doing so, the appellant did not break for the purpose of escaping or leaving. Rather, by opening the closed door, he broke in order to facilitate his reentry. At the time he committed the breaking, he did so with the intention of reentering after retrieving his firearm. Although appellant used no force to effect his reentry into the residence, he used the force necessary to constitute a breaking by opening the closed door on his way out. . . .

Holding

Sound reasoning supports the conclusion that a breaking from within in order to facilitate an entry for the purpose of committing a crime is sufficient to prove the breaking element of burglary. The gravamen of the offense is breaking the close or the sanctity of the residence, which can be accomplished from within or without. A breaking occurs when an accomplice opens a locked door from within to enable his cohorts to enter to commit a theft or by leaving a door or window open from within to facilitate a later entry to commit a crime. . . . Accordingly, a breaking occurred when appellant opened the back door of the victim's residence, even though the breaking was accomplished from within. Thus, because the evidence was sufficient to prove an intent to commit assault at the time of the breaking and the entering, the Commonwealth proved the elements of the offense. Thus, we affirm appellant's conviction.

Questions for Discussion

1. The Virginia burglary statute, section 18.2–91, punishes any person who, in the daytime, breaks and enters a dwelling house with the intent to commit larceny, assault and battery, or enters with the intent to commit any felony other than murder, rape, or robbery. Is the decision of the Virginia appellate court clearly dictated by the language of this statute? Is the court's judgment consistent with the public policy underlying the crime of burglary?
2. Why did the appellant's initial entry not constitute a burglary?
3. Would the case have turned out differently in the event that the back door was wide open when Bruce left and reentered the trailer?
4. How would you decide this case?

Hitt v. Commonwealth raises the issue of the definition of a dwelling under burglary statutes.

Was Hitt's breaking and entry into the bedroom a burglary?

Hitt v. Commonwealth, *598 S.E.2D 783 (VA. APP. 2004), Opinion by: Humphreys, C.J.*

Andy Dale Hitt appeals his conviction . . . for statutory burglary. . . . Hitt contends that the trial court erred in finding the evidence sufficient, as a matter of law, to support the conviction because the Commonwealth failed to establish that he broke and entered a dwelling house, with the intent to commit larceny. We agree and reverse Hitt's conviction for statutory burglary.

Facts

On the evening of May 22, 2002, Hitt spent the night at a friend's home. Hitt's friend, Keith, lived at the home with his father, John Burner, as well as his sister, Cara, and her minor son. Burner consented to Hitt's spending the night at the home. Hitt spent the evening, as he had on prior occasions, in the guest bedroom, a converted carport on the first floor of the home. Burner and the others slept in their bedrooms on the second floor of the home.

On the morning of May 23, 2002, Burner had approximately $3,000 in cash, on top of his bedroom dresser. For that reason, Burner locked his bedroom door, by means of an outside lock, when he left for work that morning. Before he left the home, however, Burner went to the guest room and woke up Hitt. Burner asked Hitt if he was going to work that morning, and Hitt replied, "In a little bit." Burner told Hitt not to "oversleep" and left for work. Keith had already left for work.

Sometime after Burner left the home, Cara asked Hitt to take her son to the child's grandmother's house. Hitt did so, then returned to the Burner home. At that time, Cara was still there. Hitt fell asleep "on the couch" in the guest bedroom for about "a half an hour." When he woke up, Cara had already left for work and Hitt was alone in the home.

Hitt then went upstairs to Burner's bedroom and tried to open the door. When the door would not open, Hitt used his body weight to force the door open. Hitt used enough force to open the locked door and to "knock" "a little piece of paneling" "out of place." Hitt found the money on Burner's dresser, took it, and left the home.

On June 5, 2002, Page County Sheriff's Department Investigator Rebecca Hilliard questioned Hitt about the burglary. Hitt admitted to taking the money. . . . On March 19, 2003, Hitt pled guilty to grand larceny but proceeded to . . . trial on the burglary charge.

During the trial, Hitt moved to strike the Commonwealth's evidence, arguing that the Commonwealth's own evidence proved that he had consent to be in the residence that morning and that the Commonwealth failed to establish he had broken into a "separate residence" by breaking into Burner's locked bedroom. Hitt also argued the Commonwealth failed to produce sufficient evidence that he broke into Burner's locked bedroom with the intent to commit larceny.

The trial court denied Hitt's motions, finding: "I think, by analogy . . . to the cases of secreting one's person, I think that, under the common law, an area, even though it may be on the interior of a dwelling house, which is clearly marked and delineated as being off bounds to a guest in the home, would be a sufficient breaking and entering of a dwelling house to sustain a conviction." . . . The court thus found Hitt guilty of burglary on May 7, 2003 and sentenced Hitt to a total of ten years in prison, with nine years suspended upon certain conditions.

Reasoning

Section 18.2–90 provides:

> If any person in the nighttime enters without breaking or in the daytime breaks and enters or enters and conceals himself in a dwelling house or an adjoining, occupied outhouse or in the nighttime enters without breaking or at any time breaks and enters or enters and conceals himself in any office, shop, manufactured home, storehouse, warehouse, banking house, church . . . or other house . . . with intent to commit murder, rape, robbery or arson in violation of . . . he shall be deemed guilty of statutory burglary, which offense shall be a Class 3 felony. However, if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Section 18.2–91 provides as follows:

> If any person commits any of the acts mentioned in § 18.2–90 with intent to commit larceny, or any felony other than murder, rape, robbery or arson . . . or if any person commits any of the acts . . . with intent to commit assault and battery, he shall be guilty of statutory burglary, punishable by confinement in a state correctional facility for not less than one or more than twenty years or, in the discretion of the jury or the court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $2,500, either or both. However, if the person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

> To sustain a conviction for statutory burglary . . . the Commonwealth must [thus] prove: (1) the accused . . . broke and entered the dwelling house in the daytime; and (2) the accused entered with the intent to commit any felony [other than murder, rape, robbery, or arson].

Issue

On appeal, Hitt contends that the Commonwealth failed to present sufficient evidence to establish that he "unlawfully" "broke and entered [a] dwelling house in the daytime." Specifically, Hitt contends that he had permission to be in Burner's residence on the morning of May 23, 2002, and that such permission necessarily extended to Burner's locked bedroom. Consistent with this argument, Hitt contends that a bedroom within a dwelling cannot constitute a separate "dwelling house." . . . As an alternative argument, Hitt contends the Commonwealth failed to produce sufficient evidence to show that he "entered" Burner's locked bedroom with the intent to commit larceny. Because we find that the Commonwealth's evidence failed to establish that Hitt unlawfully broke and entered a "dwelling house," . . . we do not reach the second issue.

Reasoning

"At common law, [burglary was] primarily an offense against the security of the habitation, and that is still the general conception of it." . . . "Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence." . . .

The Virginia Code expands notions of traditional common law burglary to include, among other things, entry by "breaking in the daytime of any dwelling house." . . . It is well settled that "[a] breaking, . . . may be either actual or constructive. An actual breaking involves the application of physical force, however slight, to effectuate the entry." . . . In the case at bar, there can be no question that Hitt's conduct, when considered in a "vacuum," constituted a "breaking" into Burner's locked bedroom. Indeed, Hitt conceded that he had to apply some amount of force to the door in order to open it and enter the room.

Specifically, we must determine whether Hitt's conduct, when considered under the totality of the circumstances presented here, could constitute a "breaking" of a "dwelling house," when there is no dispute that Hitt was on the premises of Burner's home with either Burner's consent or Cara's consent. In fact, no evidence was presented that suggested that Hitt "broke" into the home after he returned from delivering Cara's son to the child's grandmother's home.

We have held . . . that "in enacting Code § 18.2–89, the legislature intended to preserve the crime of common law burglary as an offense against habitation." . . . Accordingly, we found that "the term 'dwelling house' . . . means a place which human beings regularly use for sleeping." We further held that a "house remains a dwelling house so long as the occupant intends to return [to it for that purpose]." . . . Consistent with this definition, we find it clear that the place of habitation on the facts presented here was Burner's home as a whole, not his bedroom within his home.

We have recognized that all "dwelling houses must have an 'occupant' in order to satisfy the definition of 'dwelling house'" and that "all dwelling houses are necessarily 'occupied' in the sense that they are regular residences." . . . It does not contemplate individual rooms or compartments within such a "residence" that are not "dwelling houses" in and of themselves (such as a rented room within a larger dwelling, intended to be the place of habitation/residence for the individual residing therein). . . .

It is of no moment that Burner's bedroom was a place that he regularly used for sleeping. That is but one of the indicia utilized to determine whether a given structure is actually a "dwelling house" or a "regular residence" in which human beings habitate. . . . Indeed, while habitation or occupancy necessarily includes sleeping, it clearly also includes other "dwelling-related" activities, such as preparing and consuming meals, bathing, and other day-to-day activities traditionally associated with "habitation."

This conclusion also comports with the common law application of burglary in similar contexts. Specifically, breaking and entering of private "dwelling houses" used as residences. . . . Although the legislature may, and often has, extended the traditional common law notion of burglary of a "dwelling house," it has not chosen to extend this definition to rooms or compartments within a private "dwelling house," which do not constitute separate residences in and of themselves.

Holding

We thus decline the Commonwealth's invitation to extend the definition in this manner by judicial fiat. Accordingly, because we find that there is no evidence in the record suggesting that Hitt "broke" and entered Burner's home on the morning of May 23, 2002, we reverse Hitt's conviction for statutory burglary and dismiss the indictment.

Questions for Discussion

1. Why does Hitt argue that he is not guilty of burglary? What is the prosecution's argument? Explain the appellate court's reasoning in acquitting Hitt. Did Hitt possess the required criminal intent?
2. Can you interpret the language of the statute to support the trial court's conviction of Hitt? How would you amend or change the statute to strengthen the prosecution's case?
3. What if, after returning from taking Cara's son to the child's grandmother's house, Hitt found the house locked and broke and climbed in a window and thereafter entered Burner's bedroom? Would this be a burglary?
4. List several hypothetical examples of situations that will not constitute burglary under the appellate court's decision.
5. How would you rule as a judge in this case?

You Decide

12.1 Defendant John Martin Sandoval is an alcoholic. He started drinking while watching a football game, and after a twelve-pack of beer, he walked to a bar and drank an additional beer. He does not remember leaving the bar or any other location until he awoke in jail later in the day for first-degree burglary. Sandoval was found to have walked to a stranger's home at 3:20 A.M. and kicked in the front door of the home of Christiansen, a reserve deputy with the police for twelve years. Christiansen demanded to know what Sandoval was "doing in my house." Sandoval responded, "Who are you?" and shoved Christensen in the chest, knocking him back a few feet. Christensen then punched Sandoval in the head, wrestled him to the floor, and held him down until the police arrived. The Washington burglary statute declares that it is burglary in the first degree if, "with the intent to commit a crime against a person or property therein," an individual "enters or remains unlawfully in a building" and if, while entering, "[t]he actor . . . assaults any person." Sandoval and Christiansen had never met. Sandoval did not have burglary tools or take any of Christensen's property. A Washington appellate court reversed Sandoval's conviction. How would you rule? See *State v. Sandoval,* 94 P.3d 323 (Wash. App. 2004).

You can find the answer at www.sagepub.com/lippmanccl2e

You Decide

12.2 Rickford Rehmann Munger appealed his conviction for first-degree burglary based on a claim that the evidence did not establish an "intent to commit a crime within the building." In the evening of September 21, 2004, the police responded to a report of a prowler from the resident of a ground-level apartment. The complainant alleged that she saw a man walk by her apartment window several times and look into the windows of her apartment and of a neighbor's apartment and watched the man "look into her open bedroom window, which did not have a screen, reach inside, and open the curtain." The police apprehended Munger, who matched the description of the individual who she saw "peer in her window and reach inside."

Munger subsequently admitted that he reached into the open window and moved the curtain and pled guilty to first-degree burglary. "He argued that the burglary statute requires an intent to commit a crime within the building, but the factual basis for his plea established only 'window peeping,' a crime that occurred outside the building." Minnesota Statutes section 609.582, subd. 1, provides that "[w]hoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building," commits first-degree burglary if "(a) the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building." First-degree burglary is punishable by twenty years in prison or by payment of a fine of not more than $35,000. The Minnesota Supreme Court noted that the intrusion of any part of the actor's person into the building, including the intrusion of a hand to open a window, constitutes the requisite entry. Must Munger possess the intent to commit an offense within the building to be guilty of burglary under Minnesota law? Does it make sense to hold Munger guilty of burglary based on the facts of this case? See *Munger v. State,* 749 N.W.2d 335 (Minn. 2008).

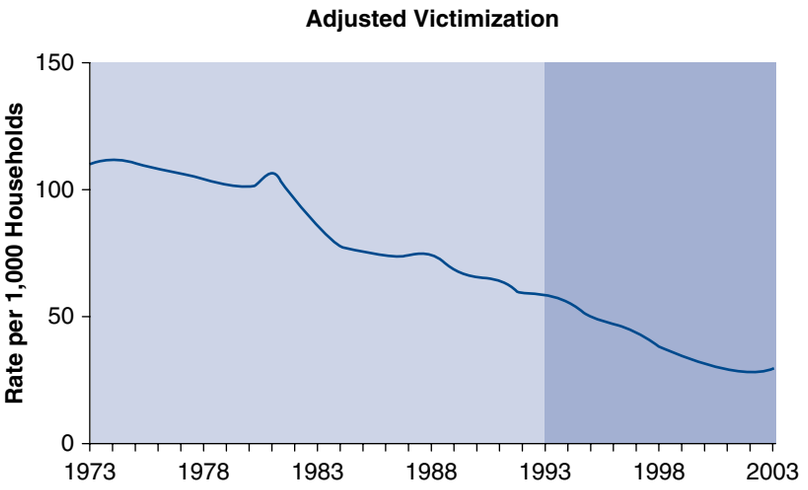
Trespass

Criminal trespass is the unauthorized entry or remaining on the land or premises of another. The *actus reus* is entering or remaining on another person's property without his or her permission. An example is disregarding a "no trespassing" sign and climbing over a fence in order to swim at a private beach. You also may commit a trespass when you swim with the owner's permission and then disregard his or her request to leave.

A **defiant trespass** occurs when an individual knowingly enters or remains on a premises after receiving a clear notice that he or she is trespassing. Keep in mind that the police, firefighters, and emergency personnel are privileged to enter any land or premises.

Criminal trespass entails an unauthorized entry, and unlike burglary, there is no requirement that the intruder intend to commit a felony. Another important point is that statutes punish a trespass on a broad range of private property. The Texas statute provides that an individual commits a trespass who "knowingly and unlawfully" enters or remains in the dwelling "of another" as well as in a motor vehicle, hotel, motel, condominium, or apartment building or on agricultural land. The federal and many state governments also have special statutes that punish trespass in schools, military facilities, and medical facilities.

Figure 12.1 Crime on the Streets: Burglary Rates



- Burglary accounts for roughly 18% of the FBI Crime Index offenses and 20% of all property crimes and, after a steep decline, has recently experienced a small increase.
- Forcible entry burglaries comprise over 60% of all burglaries. Unlawful entry burglary accounts for roughly 30% of burglaries.
- Residential burglaries are roughly 65% of all burglaries and approximately 34% are nonresidential, including stores and offices.
- Over 60% of residential burglaries occur during daytime hours. A majority of nonresidential burglaries are perpetrated at night.
- The total financial loss due to burglary is estimated at $3.3 billion per year. Residential burglaries result in an average loss of $1,482 per offense; nonresidential burglaries average $1,678 per offense.
- Individuals under 18 account for roughly 17% of all arrests for burglary.

Source: The National Crime Victimization Survey, U.S. Department of Justice.

Statutes differ on the required *mens rea:*

- *Knowingly.* Most state statutes require that the defendant "knowingly" enter or remain without authority on the premises of another. For example, you are aware that you require your neighbor's permission to hunt on his or her land and nevertheless go deer hunting.
- *Purpose.* A small number of states require a specific intent to enter or remain unlawfully on the premises. This occurs when you go hunting with the specific purpose of entering without permission on your neighbor's property in order to shoot at the deer on his or her property.
- *Strict Liability.* Missouri provides that second-degree trespass is a strict liability offense. This means that although you are unaware that you are prohibited from entering onto your neighbor's land, you nevertheless will be held criminally liable.

Most statutes require that an owner provide notice that an entry is prohibited or that individuals specifically receive and ignore a notice to leave premises. The Texas statute states that notice requires oral or written communication, fencing, or other enclosures designed to exclude intruders or to contain livestock; posted signs forbidding entry that are reasonably likely to come to the attention of intruders; special identifying purple paint marks on trees or posts; or the visible cultivation of crops fit for human consumption.[20]

Statutes typically divide trespass into various degrees. First-degree criminal trespass typically entails entering or remaining in the dwelling of another and is punished as a minor felony, carrying a jail sentence of between a number of months and several years along with a fine. Second-degree criminal trespass involves entering or remaining in enclosed buildings or fenced-in property and is typically punished as a misdemeanor resulting in imprisonment for up to several months as well as by a fine of several thousand dollars. Third-degree criminal trespass is usually categorized as a

petty misdemeanor and entails entering in or remaining on unenclosed land and is punished with a fine. Some states punish all criminal trespass as a misdemeanor.[21]

A recent development in the law of trespass is the felony of *computer trespassing.* New York's law punishes an individual who "intentionally and without authorization" accesses a computer, computer system, or network with the intent to delete, damage, destroy, or disrupt a computer, computer system, or computer network.[22] Colorado does not require an intent to tamper with a computer system and merely requires a knowing and unauthorized use of a computer or intruding without authorization onto a computer system or computer network.[23] In *Fugarino v. State,* the defendant acted angrily after learning that he had been fired from his job as a computer programmer. Fugarino announced that he was going to make certain that the company would "never get to make any money" from his design work. He immediately used a company computer to delete data from the firm's computer system and added layers of password protection to prevent his employer from gaining access to the program he designed. Fugarino was convicted of having "used a computer, owned by his employer, with knowledge that such use was without authority and with the intention of removing programs or data from the computer."[24] Can you think of other ways of applying the law of trespass to modern technology?

The next case, *State v. Chatelain,* asks you to determine whether the defendant should be convicted of criminal trespass or of burglary.

Model Penal Code

Section 221.2. Criminal Trespass

(1) A person commits an offense if knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise it is a petty misdemeanor.

(2) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespasser is given by:

(a) actual communication to the actor; or
(b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
(c) fencing or other enclosure manifestly designed to exclude intruders.

An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation (punishable by fine).

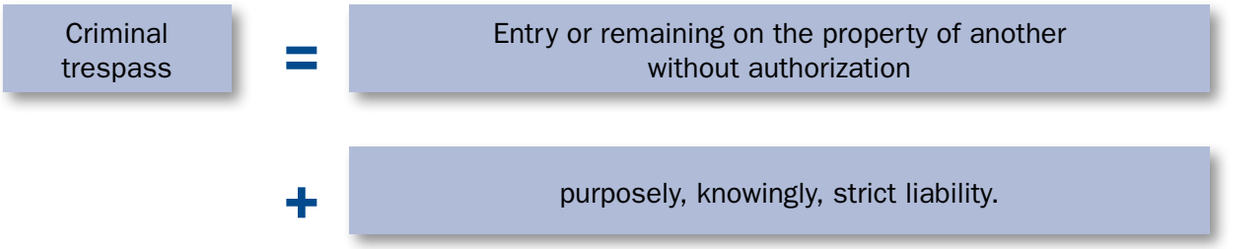
(3) It is an affirmative defense to prosecution under this Section that:

(a) a building or occupied structure involved in an offense under Subsection (1) was abandoned; or
(b) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
(c) the actor reasonably believed that the owner of the premises or other persons empowered to license access thereto, would have licensed him to enter or remain.

Analysis

- An accused is guilty of trespass and a petty misdemeanor in the event that the accused knows that he or she lacks permission to enter and nevertheless enters or surreptitiously (hiding) remains in any building or occupied structure. This is a misdemeanor if committed in a dwelling at night and is a petty misdemeanor if committed during the daytime.
- It is a violation (fine) to enter any other "place" without authorization in which a notice against trespass is posted or in which a prohibition against trespass is clear from the enclosure surrounding the area. This is a petty misdemeanor where the trespasser defies an order personally communicated to him.
- The code requires knowledge of trespass. An individual who accidentally enters on property or mistakenly believes that he or she possesses authorization to enter or remain upon property is not guilty of a trespass.
- There are three affirmative defenses to trespass.

The Legal Equation



Should Chatelain be held criminally liable for a burglary or for a trespass?

State v. Chatelain, *188 P.3D 325 (ORE. APP. 2008), Opinion by: Landau, J.*

Facts

Defendant appeals a judgment of conviction for second-degree burglary. . . . One morning at 7:00 A.M., an eyewitness saw defendant and a young female go into a neighboring house that was vacant and for sale. The neighbor watched the house for 45 minutes, during which time no one left the house. The neighbor called the police, and Officer Debler and Sergeant Harris arrived shortly thereafter. The officers found the front door locked, so they went around to the back of the house where they could hear voices and movement inside. Around that time, Sergeant Amend arrived and remained with Debler at the back of the house, while Harris returned to the front. Defendant fled out of the front door, and Harris chased him on foot. Debler got into his police car and also began pursuing defendant. Meanwhile, Amend took defendant's female companion into custody. Although she "had a really young look about her," she was "[a]t least a teenager."

With the assistance of a canine unit, the officers apprehended defendant. Defendant exhibited signs of being under the influence of methamphetamine and marijuana. Debler searched defendant and found two lighters in his pockets but no drugs or drug paraphernalia. Defendant's backpack also contained no drugs or drug paraphernalia. When police officers searched the house, they found no drugs or drug paraphernalia there either.

Debler interviewed defendant at the police station later that evening. Defendant admitted that he had entered the house without the owner's permission. He also admitted that he had entered the house intending to smoke a marijuana "roach" with his female companion. When asked how old he thought she was, he replied that she might be a minor.

Defendant was charged with second-degree burglary, third-degree escape, and resisting arrest. With regard to the burglary charge, the State alleged that defendant "did unlawfully and knowingly enter and remain in a building . . . with the intent to commit the crime of Distribution of Controlled Substance to a Minor therein." Defendant was tried by the court. As to the burglary charge, the State's theory was that defendant entered the vacant residence with the intent to commit a crime inside, specifically, to distribute marijuana to the young woman who accompanied him. . . . Defendant presented no evidence and was convicted as charged.

Issue

Defendant argues that the evidence was insufficient to corroborate his confession. In particular, he contends, the State failed to produce any evidence apart from his confession that he entered the premises with the intent to commit a crime therein. A defendant's confession . . . is not legally sufficient to support a conviction unless there is adequate corroboration. ORS 136.425(1) expressly provides that a confession is not sufficient to support a conviction "without some other proof that the crime has been committed." The questions in this case are what constitutes "some other proof" and whether the State supplied it.

Reasoning

We hold that "some proof" means that there is enough evidence from which the jury may draw an inference that tends to establish or prove that a crime has been committed. "A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein." The State argues that the injury or harm identified by that statute is unlawful entry and nothing more. Defendant, as

we have noted, contends that there must be more—that is, evidence of intent to commit a crime therein—or else proof of unlawful entry, which would suffice to corroborate the offense of criminal trespass, would also suffice to corroborate the offense of burglary. . . . A defendant's intent to commit a crime at the time of an unlawful entry is central to the crime of burglary. Without it, a defendant's conduct cannot constitute burglary of any degree; that intent is, in fact, the essence of the offense. Because the State must present independent evidence of each charged offense, the State may not corroborate a burglary simply by corroborating criminal trespass, which is a different crime.

The State cites nothing in support of its contention that unlawful entry, by itself, constitutes the injury or harm specified in the offense of burglary, and we are aware of none. The "basic rationale of the sections on criminal trespass is the protection of one's property from unauthorized intrusion by others," while the injury or harm associated with burglary goes beyond that and includes the protection of one's property against the threat of intrusion for the purpose of committing a crime. We also note that our conclusion is consistent with the rule in other jurisdictions. *State v. Hale,* 45 Haw. 269, 367 P.2d 81 (1961), is illustrative. In that case, the Hawaii Supreme Court held that

> [i]t is, however, an essential element of the crime of burglary under our statute that the entry should be accompanied with an intent to steal, or to commit some felony. The intent is the gist of the offense. Without it there can be no violation of the statute. Thus, proof of the intention to steal or commit a felony is . . . clearly requisite to the proof of either the basic injury or of criminality.

The State argues that even if it was required in this case to corroborate defendant's intent to commit a crime—in this case, distribution of a controlled substance to a minor, as alleged in the indictment—the evidence was sufficient to do just that. According to the State, the record shows that (1) defendant entered the building with the young female at 7:00 A.M.; (2) Sergeant Amend had probable cause to arrest defendant's female companion for burglary; (3) defendant fled when he heard the police arrive; and (4) defendant exhibited signs of being under the influence of a controlled substance when he was apprehended. The State, however, never explains precisely how any of those four pieces of evidence, alone or in conjunction, tends to suggest that defendant entered the premises with the intent to distribute a controlled substance to his female companion.

First, the time of day supports no particular inference either in isolation or in conjunction with any other evidence about defendant's intent to distribute marijuana. Second, the fact that the police officer had probable cause to arrest defendant's companion supports no inference about defendant's mental state. Third, defendant's flight from the house supports no inference about defendant's prior mental state, particularly with respect to supplying marijuana to his companion. Finally, although the fact that defendant himself appeared to be under the influence of a controlled substance supports an inference that he used drugs in the house, it supports no inference that he offered drugs to his female companion. In that regard, we note that the State produced no evidence that his companion exhibited any signs of being under the influence at the time. The State also produced no evidence of drugs or drug paraphernalia either in the house or on defendant or on his companion.

Holding

Because the record is devoid of any evidence to support an inference that defendant intended to distribute drugs to his female companion when he entered the house, the evidence was insufficient to corroborate defendant's confession regarding his second-degree burglary conviction. Accordingly, the State failed to meet its burden to prove all elements of that crime beyond a reasonable doubt.

Questions for Discussion

1. Why does the appellate court hold Chatelain criminally responsible for trespass rather than robbery?
2. Do you agree with the judgment of the appellate court?

You Decide

12.3 Defendant was charged with third-degree criminal trespass for throwing rocks at a house. She was found guilty. She argues that the evidence was insufficient to support a charge for third-degree criminal trespass because a person must enter onto the property to be guilty of trespass. Kentucky law provides that a "person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises." Kentucky Revised Statute 511.080. In affirming the conviction of D.E., the circuit court judge explained that "[a]n individual could simply avoid all criminal trespassing charges by assembling a long pole that would allow the individual to reach onto another person's property while the individual remained on his own or public property." See *D.E. v. Commonwealth,* 271 S.W.3d 539 (Ky. Ct. App. 2008).

You can find the answer at www.sagepub.com/lippmanccl2e

Arson

For a deeper look at this topic, visit the study site.

Common law **arson** is defined as the willful and malicious burning of the dwelling house of another. The purpose is to protect the home along with the occupants and their possessions. Blackstone justifies treating arson as a felony punishable by death on the grounds that murder "seldom extends beyond the felonious act designed," but "fire too frequently involves in the common calamity persons unknown to the incendiary and not intended to be hurt by him . . . friends as well as enemies."[25] Common law arson has been substantially modified by state statutes.

Burning

The common law requires a burning. This is commonly defined as the "consuming of the material" of the house or the "burning of any part of the house." The burning is not required to destroy the structure or seriously damage the home. The burning is required to affect only a small portion of the dwelling, no matter how insignificant or difficult to detect. Even a small "spot" on the floor is sufficient.[26] Professor Perkins quotes a decision that establishes that the test for burning is whether "the fiber of the wood or other combustible material is charred, and thus destroyed" by fire.[27]

The burning need not involve an actual flame and need merely result in a "charring" of the structure. This does not include "soot," "smudging," "blackening or discoloration or shriveling from heat" or "smoke damage." The common law did not consider an explosion as arson unless the combustion resulted in a fire.[28]

The trend is for state statutes and courts to broadly interpret arson statutes and to find that even smoke damage and soot are sufficient.[29] A New Jersey statute defines third-degree arson without requiring damage and provides that an individual commits arson when he or she "purposely starts a fire and recklessly places a person in danger of death or bodily injury or recklessly places a building or structure in danger of damage or destruction."[30] Florida explicitly punishes a fire or explosion that damages or causes to be damaged an occupied structure as well as other similar structures.[31]

Dwelling

Arson at common law must be committed against a dwelling. This is defined by the familiar formula as a place regularly used for sleeping. The definition reflects the fact that criminal laws against arson are designed to protect individuals and their right to the peace and security in the home. The occupants may be absent at the time of the arson, so long as the structure is regularly used for sleep. The burning of a building under construction or of an abandoned building does not constitute arson. The definition of dwelling extends to all structures within the curtilage, the area immediately surrounding the home. This includes a barn, garage, or tool shed.

Statutes no longer limit arson to a dwelling. Illinois, in addition to prohibiting residential arson, punishes damage to real property (buildings and land) and to personal property (e.g., personal belongings). Aggravated arson is directed against injury to individuals resulting from the arson of "any building or structure, including any adjacent building . . . including . . . a house trailer, watercraft, motor vehicle or railroad car." Statutes that include personal property extend arson to the burning of furniture in a house regardless of whether the fire damages the dwelling.[32]

This broadening of the coverage of arson statutes means that laws against arson no longer protect only the home. Arson now protects buildings and vehicles in which individuals are likely to spend a portion of the day and is intended to fully combat the danger posed by fire to human life and property.

Dwelling of Another

The common law required that the burned dwelling was occupied by another individual. As with burglary, the central issue is occupancy rather than ownership. A tenant would not be guilty of arson for burning his or her rented apartment that is owned by the landlord; the landlord would be guilty of arson for burning the house that he or she owns and rents to the tenant. A husband would not be guilty of arson for burning the home he shares with his wife.

Modern statutes have eliminated the requirement that the arson must be directed at the dwelling "of another." Florida holds an individual liable for arson in the first degree "whether the property [is] of himself or herself or another."[33] Courts have reasoned that a fire poses a threat to firefighters, as well as to the neighbors, and have held that it is not an unreasonable limitation on property rights to hold a defendant liable for burning his or her own property. Do you agree?

Willful and Malicious

The *mens rea* of common law arson is malice. This does not require dislike or hatred. Malice in arson entails either a purpose to burn or a knowledge that the structure would burn or the creation of an obvious fire hazard that, without justification or excuse, damages a dwelling. An "obvious fire hazard" is created when an individual recklessly burns a large pile of dry leaves on a windy day and in the process creates an unreasonable hazard that burns a neighbor's house. A negligent or involuntary burning does not satisfy the requirement for common law arson.

For an international perspective on this topic, visit the study site.

State statutes typically retain the common law intent standard and include language such as "willfully and maliciously." Separate statutes often punish a reckless burning. A number of states also punish a burning committed by an individual with the specific intent to defraud an insurance company.

Grading

State statutes are typically divided into arson and aggravated arson. Some states provide for additional categories. Washington provides for knowing and malicious arson and aggravated arson, as well as for reckless burning. The Washington statute categorizes arson as aggravated based on various factors, including causing a fire or explosion that damages a dwelling or that is dangerous to human life. Aggravated arson also includes causing a fire or explosion on property valued at $10,000 or more with the intent to collect insurance.[34] Washington state punishes aggravated arson by life imprisonment, along with a possible fine of up to $50,000, while arson is punishable by 10 years, by a fine of up to $20,000, or by both confinement and a fine.[35] California enhances the punishment of "willful and malicious" burning and of "reckless" burning when the perpetrator has been previously convicted of either offense, a police officer or firefighter is injured, more than one victim suffers great bodily injury, multiple structures are burned, or the defendant employed a device designed to accelerate the fire.[36]

The next case, *Williams v. State,* discusses the type of fire damage to a dwelling required to convict a defendant of arson.

The Statutory Standard

Compare the Illinois arson statute with common law arson.

Illinois 720 ILCS 5/201. Arson

A person commits arson when, by means of fire or explosive, he knowingly:

(1) Damages any real property, or any personal property having a value of $150 or more, of another. . . .

(2) With intent to defraud an insurer, damages any property, or any personal property having a value of $150 or more.

(3) Arson is a Class 2 felony (3–7 years in prison).

Illinois 720 ILCS 5/20–1.1. Aggravated Arson

- A person commits aggravated arson when in the course of committing arson he knowingly damages . . . any building or structure . . . including . . . a house trailer, watercraft, motor

vehicle, or railroad car, and (1) he knows or reasonably should know that one or more persons are present . . . (2) any persons suffer great bodily harm, or personal disability or disfigurement as a result of the fire or explosion or (3) a fireman or policeman . . . acting in the line of duty, is injured. . . .

- Aggravated arson is a Class X felony (6–30 years in prison).

Illinois 720 ILCS 5/20–1 Residential Arson

(1) . . . In the course of committing an arson, a person knowingly damages partially or totally, any building or structure that is the dwelling place of another.

(2) Residential arson is a Class 1 felony (4–15 years in prison).

Model Penal Code

Section 220.1. Arson and Related Offenses

(1) Arson. A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:

(a) destroying a building or occupied structure of another; or

(b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. It shall be an affirmative defense . . . that the actor's conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury.

(2) Reckless Burning or Exploding. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion whether on his own property or another's, and thereby recklessly:

(a) places another person in danger of death or bodily injury; or

(b) places a building or occupied structure of another in danger of damage or destruction.

(3) Failure to Control or Report Dangerous Fire. A person who knows that a fire is endangering a life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:

(a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire;

(b) the fire was started . . . lawfully, by him or with his assent, or on property in his custody or control.

(4) Definitions. "Occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietary interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

Analysis

- The Model Penal Code in section 220.1(1)(a) defines arson in terms of starting a fire or causing an explosion with the purpose of destroying a building or occupied structure of another.
- Directing punishment at individuals who start or cause a fire or explosion results in their being held liable for arson despite the fact that the fire is extinguished before damage results.
- Arson is punishable by a maximum of ten years in prison under the Model Penal Code. This would be in addition to punishment for any resulting injury to individuals.
- The requirement of a purpose to destroy a building or occupied structure or to destroy or damage property means that a specific intent is required for arson.

- The commentary states that the terms *building* and *occupied structure* are intended to refer to structures that are capable of occupancy. This restricts arson to fires or explosions dangerous to the life of inhabitants and firefighters. An individual need not be actually present in the dwelling.
- Arson to defraud in section 220.1(1)(b) includes property owned by the defendant as well as another. There must be an intent to defraud an insurance company, and this provision includes all types of property.
- An individual is not liable for arson where the property of another or other persons is not endangered. This is designed to avoid the harsh penalties for arson when another person or his or her property is not recklessly endangered.
- Reckless burning or exploding is punishable by five years in prison. There is no requirement of a purpose to destroy a structure.
- The duty to undertake affirmative action to prevent and control fires is imposed.

The Legal Equation

Arson	=	Setting fire to dwelling (other structures under state statutes) or structures in curtilage
	+	intent to burn, knowing will burn, reckless creation of risk of burning
	+	burning of dwelling (smoke damage is sufficient under state statutes).

Do soot and smoke damage constitute arson?

Williams v. State, *600 N.E.2D 962 (IND. APP. 1992),* Opinion: Garrard, J.

Facts

On December 31, 1990, Carol Hines hosted a New Year's Eve gathering at the home of her sister, Annette Hines. Annette was in Chicago at the time, and Carol was left in charge of the house and Annette's three children.

During the course of the evening, the guests were playing cards and drinking. Shortly before midnight, Tonyia Dee Williams arrived at the house and asked about some money that Annette had been holding for her and requested use of the telephone. Williams went upstairs to use the telephone but found that Annette's teenage son, Lamont, was already on the phone with his girlfriend. After arguing over use of the phone, Williams was allowed to use it.

At the stroke of midnight, the partygoers began to celebrate by shaking up beer containers and pouring beer onto one another. Lamont joined in the revelry by pouring a beer onto the head of Williams. Williams, taking heated exception to being doused with beer, pulled the phone cord out of the wall and chased Lamont down the stairs and into the basement. Lamont locked himself in one of the rooms in the basement while Williams proceeded to pound on the door with the telephone. Carol, after observing Williams and Lamont run past her and into the basement, went downstairs and asked Williams to leave. Williams, however, refused to leave. Carol and

Lamont then went upstairs, leaving Williams alone in the basement. Shortly after this, Chaka Jennings, Carol's daughter, overheard Williams say through a furnace vent: "I hope all you mother f___s burn up."

Soon after these events, Carol went back to check on Williams, and when Carol opened the basement door, a ball of smoke met her at the door. The house was then evacuated, and one of the guests, William Sanders, put out the fire by throwing dirty laundry onto the flames to smother it. The only physical damage caused by the fire, besides the burned clothes, was smoke throughout the house and soot and smoke damage to one of the walls in the basement.

Williams had meanwhile left the house through a side door and was five houses down the street before Carol could catch up with her. When Carol caught up with her, the two argued again, and Carol accused Williams of starting the fire. Carol Hines and the children were unable to stay in the house that night because of all the smoke.

On April 25, 1991, a jury found Tonyia Dee Williams guilty of arson, a Class B felony. Williams appeals her conviction, and we affirm.

Issue

Williams presents two issues for appeal, which we restate as follows: (a) whether soot and smoke damage constitute "damages"; (b) whether the trial court erred in prohibiting defense counsel from inquiring into a previous unrelated fire at the house. . . .

Reasoning

First, Williams contends that the soot and smoke damage to the wall of the basement do not constitute "damages" within the meaning of IC 35–43–1-1(a). We disagree. A "person who, by means of fire or explosive, knowingly or intentionally damages: (1) a dwelling of another person without his consent . . ." The word "damages" is not further defined by the statute.

It is Williams' contention that this offense requires proof of burning or charring as was the case at common law. Traditionally, the common law rigidly required an actual burning. The fire must have been actually communicated to the object to such an extent as to have taken effect upon it. In general, any charring of the wood of a building, so that the fiber of the wood was destroyed, was enough to constitute a sufficient burning to complete the crime of arson. However, merely singeing, smoking, scorching, or discoloring by heat were not considered enough to support a conviction.

The State contends that the word "damages" in our present statute is not tied to the common law definition of the word "burning" and should therefore be construed in its plain and ordinary sense. Any damage, even smoke damage, would therefore be enough to satisfy the requirements of the statute. We agree with the State.

In this case, there is no indication from the statute that any special meaning is to be given to the word "damages." Webster's Third New International Dictionary (1976) defines damage to mean "loss due to injury: injury or harm to person, property, or reputation: hurt, harm." In this case, there is clearly some harm done to the basement wall by the smoke damage and soot. Other states with similar statutes have held that smoke damage is enough to meet a requirement of "damage" in their statutes. We . . . therefore find that the smoke damage and the soot on the basement wall were enough to support a conviction for arson. . . .

Williams contends that the trial court erred in prohibiting defense counsel from inquiring into a previous unrelated fire at the house. We disagree. During cross-examination of the State's witness, Annette Hines, the following occurred:

Q:	Now, she [Williams] wasn't in your house earlier in 1990 when you had a house fire then, was she?
A:	No, she wasn't.
Q:	How was that fire started?
The State:	Objection, Your Honor, it's irrelevant.
The Court:	Would, both attorneys come up here.

Evidence is relevant when it throws or tends to throw light on the guilt or innocence of an accused even though its tendency to do so may be slight. It is well settled, however, that rulings on the relevancy of evidence are entrusted to the broad discretion of the trial judge. . . .

The testimony that the defendant desired to introduce would have tended to show that the children of Annette Hines had set a previous fire in the house. Specifically, the defendant's offer of proof showed that the defense had a witness that had heard a statement from Annette Hines that her children had set a fire that occurred in the house six months prior to the New Year's Eve fire. This evidence would have been . . . designed to cast a mere suspicion over Williams's involvement in the fire. The trial court did not err in excluding this testimony. . . .

Holding

For the foregoing reasons, the judgment of the trial court is affirmed. We . . . find that the smoke damage and the soot on the basement wall were enough to support a conviction for arson. . . .

Questions for Discussion

1. What is the rule as to property damage under common law arson? How does the appellate court's interpretation of the Indiana statute differ from the common law standard?
2. Why does the Indiana court adopt this interpretation? Would the defendant be guilty under a common law standard? Does the common law or Indiana statutory standard provide the best legal test?
3. Why does the defense want to introduce the evidence concerning the previous fire set in the house? What is the reason the trial judge refuses to admit this evidence? How would you have ruled?
4. As a juror, would you expect the prosecution to introduce forensic evidence linking the defendant to the fire?

People v. Fox discusses the definition of a building under the New York arson statute, an issue that also is important for burglary.

Did the defendant commit arson when he burned down the structure erected by homeless people?

PEOPLE V. FOX, *771 N.Y.S. 2D 156 (N.Y. APP. 2004),* OPINION BY: MILLER, J.

Appeal by the defendant from a judgment . . . convicting him of murder in the second degree, arson in the second degree, and reckless endangerment in the first degree, upon a jury verdict, and imposing sentence.

Facts

The charges herein stem from an April 27, 2000, fire initiated at a structure erected by a group of homeless people for overnight lodging, located on 65th Street and Fourth Avenue, under the Gowanus Expressway overpass, in Brooklyn. The structure's two side walls consisted of two parallel existing fixed and unmovable fences. The remaining two walls consisted of carpets draped over a clothesline that extended between the two fences. A piece of plywood provided additional support to one side of the structure and buttressed it against strong winds. The entrance was covered by shower curtains and blankets, and the entire shelter was covered by a 30-by-50-foot blue tarp. The residents slept in sleeping bags or on mattresses, which were laid on carpeting on the ground. Electricity was supplied by an extension cord that was connected to a light socket at a nearby subway station. During the winter months, electric and kerosene space heaters were utilized to warm the structure. The central issue on appeal is whether the structure constituted a "building" within the meaning of Penal Law section 150.15, which could be the subject of the crime of arson in the second degree.

Reasoning

The term "building" is broadly defined in Penal Law section 150.00(1) to include its "ordinary meaning" as well as "any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein." It is a well-settled rule of statutory construction that a court's function is to "attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." . . .

The "ordinary meaning" of the term "building" has been alternatively defined as "a constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling" . . . "a structure with a roof and walls" . . . and "[a] structure or edifice inclosing a space within its walls and usually, but not necessarily, covered with a roof." . . . The term generally, though not always, implies the idea of a habitat for a person's permanent use or an erection connected with his or her permanent use. . . .

Holding

At the time of the incident, a number of the shelter's residents, including, apparently, the decedent, had been utilizing the structure for overnight lodging for several months. Moreover, it contained substantial indicia of a permanent or long-term habitat (e.g., incorporation of the two fixed fences, a roof, plywood, carpeting, and diverted electrical service). Therefore, we conclude, consistent with the legislative intent of the statute, that the structure satisfied the statutory definition of a building either because it had been utilized for overnight lodging or because it fits within the "ordinary meaning" of the term.

Questions for Discussion

1. How does the appellate court define "building"? Do you agree with the court's determination that the structure constitutes a building?
2. What facts are crucial to the court's conclusion that the structure is a building?
3. Why was the defendant held liable for murder? Do you believe that a crime directed against the homeless should be punished more severely, less severely, or no differently than any other criminal offense?

You Decide

12.4 Arbie Jo Buckley poured kerosene onto her husband, George House, as he lay on the sofa. The kerosene soaked into his clothes and onto the sofa and floor of the trailer home. Arbie then threw a match onto George. He awoke to find that he was on fire, and he later died. The fire subsequently spread to the sofa and trailer home. Arbie was convicted of felony murder, carrying the death penalty. The Mississippi statute required a finding that George had been killed during the course of a felony, one of which is arson. Was George killed during the course of an arson? Would you affirm or reverse Arbie's conviction? See *Buckley v. State*, 875 So. 2d 1110 (Miss. App. 2004).

You can find the answer at www.sagepub.com/lippmanccl2e

Criminal Mischief

The common law misdemeanor of malicious mischief is defined as the destruction of, or damage to, the personal property (physical belongings) of another. The Model Penal Code refers to this offense as **criminal mischief**, and under modern statutes, criminal mischief includes damage to both personal and real (land and structures) **tangible property** (physical property as opposed to ownership of intangible property, such as ownership of a song or the movie rights to a book). The offense is directed against interference with the property of another and punishes injury and destruction to an individual home or personal possessions.

Malicious mischief under most statutes is a minor felony and the punishment is reduced or increased based on the dollar amount of the damage. A sentence may also be increased when the damage is directed against a residence or interferes with the delivery of essential services, such as phone, water, or utilities.

Actus Reus

The Model Penal Code specifies that criminal mischief is composed of three types of acts:

1. *Destruction or Damage to Tangible Property.* Injury to property, including damage by a fire, explosion, flood, or other harmful force.
2. *Tampering With Tangible Property so as to Endanger a Person or Property.* Interference with property that creates a danger, for example, the removal of a stop sign or one-way road sign.

Crime in the News

The FBI over the past eight years has listed the Earth Liberation Front (ELF) as posing one of the leading domestic terrorist threats. The loosely organized group is committed to stopping (or what it terms "monkeywrenching") projects that it views as posing an environmental threat. Its guiding principle is that there is "no right to poison, pollute or destroy the environment" and that there is "no compromise in defense of mother earth." This has led the ELF to torch housing projects and resort developments, to sabotage logging operations and roads, to burn gas-guzzling automobiles on sales lots, to destroy animal slaughterhouses, and to disrupt scientific research projects that are viewed as posing an environmental hazard. The ELF points to the fact that its actions are aimed at property and are not directed against individuals. But critics claim that the ELF has enabled critics to portray environmentalists as radical terrorists. Once violence is justified to achieve political ends, there is nothing to prevent individuals with

an opposing view to resort to similar violent tactics. The ELF rejects the charge that its members are "ecoterrorists" and compares their actions to the Boston Tea Party and to the American Revolution.

In March 2008, the ELF shocked the residents of Seattle when it set fire to several $3 million houses in the suburb of Woodville. The "eco-friendly" homes had been designed with the latest environmentally sustainable materials. In the charred remains, the ELF left a sign that read, "Built Green? Nope black!" The ELF claimed that its actions were justified because the development threatened the habitat of Chinook salmon and nearby wetlands. The Seattle arson was only the latest in a series of arson ELF attacks on housing projects that were undertaken under the claim that "you build it, we burn it." In 2000, the ELF torched eleven homes in Phoenix, Arizona, that the group claimed were part of an urban sprawl that encroached on wilderness areas. This fire was followed by the 2003 arson of a San Diego, California, apartment complex. One of the ELF's most destructive attacks was the 1998 arson of a Vail, Colorado, ski lodge development that resulted in $12 million in damage. The ELF explained that the lodge's planned expansion threatened an animal habitat and that the operators of the lodge had placed profits ahead of Colorado wildlife and the environment.

In May 2001, Lacey Phillabaum, a former high school debater and art history major at the University of Oregon, and Jennifer Kolar, whose passion for the environment had led her to enroll at the University of Colorado, ignited a time-delayed firebomb that caused $7 million in damage to the University of Washington Center for Urban Horticulture. The two women objected to the center's genetic research, which they claimed was designed to increase the growth rate of trees in order to allow the trees to be harvested more quickly by logging companies. The explosion and resulting fire also destroyed environmentally valuable research on wetlands and on the protection of endangered plants. The two women pled guilty to arson and to other crimes and promised to cooperate in other federal investigations of ecoterrorism. Phillabaum received a three-to-five-year sentence and Kolar a five-to-seven-year sentence. The alleged leader of the plot, Bill Rogers, was implicated in nine additional attacks and committed suicide in an Arizona jail following his apprehension. In June 2008, Briana Waters, a violin teacher and mother of a young child, was convicted of three counts of arson based on her having aided and abetted the arson of the Center for Urban Horticulture. Waters received a sentence of six years in prison and was required to pay $6 million in restitution. The arson at the University of Washington was similar to the 1999 arson of an agricultural building at Michigan State University, which resulted in a member of the ELF being sentenced to nine years in prison. At Waters's trial, an Assistant U.S. Attorney charged that Waters was part of a conspiracy that had set seventeen fires in four states over five years. The FBI estimates that the ELF's attacks have resulted in roughly $80 million worth of damage. At least thirteen other alleged ecoterrorists have been convicted of federal crimes.

Federal courts have held that the arson attacks of the ELF may be considered terrorism and subject to an "enhanced penalty" if "calculated to influence or affect the conduct of government" or "to intimidate or coerce a civilian population." At least three states have passed laws that consider "acts of destruction" aimed at protecting animal rights or protesting the destruction of the environment as terrorism that are subject to a severe sentence. Defense lawyers have protested that it is unfair to equate the ELF with Osama Bin Laden. Do you agree?

3. *Deception or Threat Causing Financial Loss.* A trick that dupes an individual into spending money. An example is sending a telegram falsely informing an individual that his or her mother is dying in a distant city, causing the individual to spend several hundred dollars on an unnecessary plane flight.

Mens Rea

The Model Penal Code requires that these acts be committed purposely or recklessly. Damage to property by "catastrophic means," such as an explosion or flood, may be committed negligently. The punishment of criminal mischief under the Model Penal Code is based on the monetary damage of the harm. Keep in mind that property damage resulting from a fire or explosion that purposely endangers the person or property of another may be punished as arson.

The Statutory Standard

The Florida criminal mischief statute illustrates the broad definition of criminal mischief under state statutes.

Florida Statutes Section 806.13

(1) (a) A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including . . . the placement of graffiti thereon or other acts of vandalism. . . .

(2) Any person who willfully and maliciously defaces, injures or damages . . . any church, synagogue, mosque, or other place of worship, or any religious article . . . commits a felony of the third degree. . . .

(3) Whoever . . . willfully destroys or substantially damages any public telephone . . . commits a felony of the third degree.

(4) Any person who willfully and maliciously defaces, injures or damages . . . a sexually violent predator detention or commitment facility . . . commits a felony of the third degree. . . .

(5) (a) . . .

(5) (b) . . .

(6) (a) Any person who violates this section when the violation is related to the placement of graffiti, in addition to any other criminal penalty, shall be required to pay a fine. . . .

The Legal Equation

Criminal mischief = Destruction or damage or tampering with tangible property or deception or threat causing financial loss

\+ purposely, knowingly, recklessly or negligently.

Can a spouse vandalize property within a home jointly owned with his wife?

People v. Wallace, *19 CAL. RPTR. 790 (CAL. APP. 2004), Opinion by: Gomes, J.*

Facts

One summer evening in Fresno, Anthony LeRoy Wallace's wife of two months, Arlissa Pointer Wallace, caught him smoking crack cocaine, called him a crack head, and told him to leave the house she had bought six or seven years before the marriage and had refinanced shortly after the marriage. Although she had kept the house in her name, Wallace presumably had acquired a small community property interest through mortgage payments with community property funds [community property is property in the marriage in which both parties possess a financial interest].

Instead of leaving, however, Wallace began tearing up the house. Frightened, Pointer kept her distance from him as she opened the living room curtains in the hope that a neighbor might see and call the police. He kept breaking things. Twice she dialed 911, but twice she hung up, fearing things would get much worse if he knew she had called. He left before the police arrived. She told a police officer that the only thing he had not broken in the house was his own stereo and that everything else in the house belonged to her. A couple of hours later, alerted by a neighbor to "incredible pounding, very, very loud noise" from the house, police officers found Wallace inside the house breaking things again. Only after he challenged three armed and uniformed officers to fight did they subdue him with a taser and arrest him.

At trial, an expert witness testified to over $9,000 of damage to the house and to over $6,000 of damage to the

furniture and furnishings. A jury found Wallace guilty of felony vandalism and of two misdemeanors—being under the influence and resisting, delaying, or obstructing an officer ("resisting")—and found two assault with a deadly weapon priors true as both serious felony priors and prison term priors. . . . The court sentenced him to a 25-to-life term for felony vandalism, a consecutive term of one year on each of his two prison term priors, and time served on each of his two misdemeanors.

Issue

Wallace argues that as a matter of law, he cannot be guilty of vandalizing either community property or his spouse's separate property inside the marital home. In the published portion of our opinion, we will reject his argument and embrace the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest . . . whether the harm occurs outside or inside the marital home. . . .

The question before us is whether a spouse can be guilty of vandalizing community property and the other spouse's separate property inside the marital home. Wallace asks us to answer that question in the negative on the basis of "the common law rule that a person's home is his or her castle" and the language in the vandalism statute that a vandal can deface, damage, or destroy only property that is "not his or her own." The Attorney General asks us to answer that question in the affirmative, arguing that vandalism is not a crime that threatens property rights only in a particular place, that the criminal law protects each owner's interest in community property against nonconsensual damage by the other, and that Pointer's separate property suffered most of the harm anyway.

Section 594, subdivision (a) provides that: "Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism: (1) Defaces with graffiti or other inscribed material. (2) Damages. (3) Destroys."

Reasoning

In *People v. Kahanic,* 241 Cal. Rptr. 722 (Cal. App. 1987), we held that the vandalism statute applies to community property on the rationale that the "essence of the crime is in the physical acts against the ownership interest of another, even though that ownership is less than exclusive." . . . However, Wallace argues that with the vandalism in *Kahanic* occurring outside the marital home, the case is inapposite to the issue here whether "the common law rule that a person's home is his or her castle" precludes criminal liability for vandalizing property in one's own home. He analogizes that issue to the question whether a person can burglarize his or her own home and notes the California Supreme Court relied on the common law rule to hold that the burglary statute applies only to "a person who has no right to be in the building." . . . [H]e argues that as one can neither burgle nor trespass in one's own home, neither can one vandalize property in one's own home.

Wallace's argument ignores three key differences between vandalism, on the one hand, and burglary and trespass, on the other. First, one can commit vandalism anywhere, but one can commit burglary and trespass only by entering into a specific place. Second, one cannot commit vandalism without defacing, damaging, or destroying property, but one can commit burglary and trespass without harming any property at all. Third, the harm that vandalism by a spouse necessarily inflicts to community property or to the other spouse's separate property ousts the other spouse of his or her ownership interest in a way that neither burglary nor trespass necessarily does. Together, those differences foil Wallace's endeavor to broaden to vandalism the rule that applies to burglary and trespass.

Holding

On the question before us, we broaden our holding in *Kahanic* to embrace the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest, whether the property is individual or marital, whether the harm occurs outside or inside the marital home. "[W]hen a husband destroys property that he owns jointly with his wife, not only does he destroy his property, which he may have a right to destroy, but he simultaneously destroys his wife's undivided one hundred percent interest in the property, which he does not have a right to destroy." . . . Accordingly, we answer in the affirmative the question before us and hold that a spouse can be guilty of vandalizing community property and the other spouse's separate property inside the marital home.

Questions for Discussion

1. What is Wallace's argument that he should not be held guilty of vandalism? How does the prosecution respond?
2. Would Wallace have been convicted had he been the sole owner of the property he destroyed?
3. Could Wallace burglarize or trespass on property he jointly owns with his wife?
4. How would you have decided this case? What if Wallace, rather than his wife, originally owned the home and his wife possessed a small community property interest?

You Decide

12.5 On July 17, 2007, the defendant painted a wooden fence belonging to his neighbors without permission. He painted along the side of his yard and the back of his yard. The defendant said that the fence facing his property was "in need of repair and painting" and he proceeded to paint the sides facing his property. His intent was to improve the appearance of the fence. The defendant was charged under a New York statute that punished an individual for "intentionally damaging property of another person . . . having no right to do so nor any reasonable ground to believe that he has such right." Would you convict the defendant of "criminal mischief to property"? See *People v. Stockwell*, 18 Misc. 3d 1145A (N.Y. City Ct. 2008). How does this differ from spray painting gang insignia or graffiti on the wall? See *In Re Nicholas*, 102 Cal. Rptr. 2d 59 (Cal. App. 2000).

You can find the answer at www.sagepub.com/lippmanccl2e

Chapter Summary

Crimes against habitation protect individuals' interest in safe and secure homes free from uninvited intrusions. Burglary and arson are the cornerstones of the criminal law's protection of dwellings. Modern statutes have significantly expanded the structures protected by burglary and arson.

Burglary at common law is defined as the breaking and entering of the dwelling house of another at night with the intention to commit a felony. State statutes have significantly modified the common law and differ in their approach to defining the felony of burglary. In general, a breaking no longer is required, and burglary has been expanded to include a range of structures and vehicles. Statutes provide that a burglary may involve entering as well as remaining in a variety of structures with the requisite purposeful intent. The intent standard has been broadened under various statutes to include "any offense" or a "felony or misdemeanor theft." Also, burglary is no longer required to be committed at night.

Criminal trespass is the unauthorized entry or remaining on the land or premises of another. Trespass is distinguished from burglary in that it does not require an intent to commit a felony or other offense and extends to property beyond the curtilage, including agricultural land. Statutes provide that a trespass may be committed knowingly or purposefully, and Missouri defines trespass as a strict liability offense.

Arson at common law is defined as the willful and malicious burning of the dwelling house of another. This is treated as a felony based on the danger posed to inhabitants and neighbors. Statutes no longer require a burning; even smoke damage or soot is sufficient. Arson also extends to a broad range of structures and is no longer limited to the dwelling of another. Arson requires either a purpose to burn or knowledge that a structure will burn. It may also be committed recklessly by creating an unreasonable hazard on an individual's own property that burns a neighbor's dwelling.

Criminal mischief under modern statutes punishes the damage, destruction, or tampering with personal and real tangible property or may involve a deception causing financial loss. Criminal mischief is generally punished as a misdemeanor and may be committed purposefully or recklessly.

Keep in mind that statutes typically aggravate or enhance the penalty for crimes against habitation. Aggravating circumstances include a crime involving a dwelling or an act that endangers human life or safety, is carried out with a weapon, is committed at night, or causes significant financial loss.

Chapter Review Questions

1. What is the definition of burglary? How have the elements of the common law crime of burglary been modified by modern statutes?
2. What is the difference between burglary and trespass?
3. Define *arson*. How have modern statutes modified the common law crime of arson?
4. What are the three types of acts that satisfy the *actus reus* of criminal mischief?
5. Compare and contrast arson and criminal mischief.
6. What are some factors that aggravate burglary, arson, trespass, and criminal mischief?
7. Discuss the justifications for crimes against habitation. Is it accurate to continue to categorize burglary and arson as crimes against habitation?

Legal Terminology

arson

burglary

criminal mischief

criminal trespass

curtilage

defiant trespass

tangible property

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read about the investigation of a fire in a dorm at Seton Hall University, which resulted in the deaths of three students.
2. Learn about Charles Peace, a nineteenth-century burglar who is considered the most skilled and daring burglar in history.

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13 Crimes Against Property

Did the defendant take the purse through force or intimidation?

On December 14, 1996, Elaine Barker was in the parking lot of a K-Mart store unloading items from a shopping cart into the trunk of her car. She left her purse in the shopping cart, and while she was transferring the items she had purchased, the defendant came over, grabbed the purse, and ran away. Barker chased the defendant on foot and caught up with him, but by that time, he had gotten into his car and closed the door. Barker then sat on the hood of the defendant's car, thinking that would prevent him from driving away. Instead, the defendant started and stopped the car several times while Barker held on to a windshield wiper to keep from falling off. The defendant turned the car sharply causing Barker to fall to the ground. As a result of the fall, Barker suffered a broken foot and lacerations that required stitches.

Core Concepts and Summary Statements

Introduction

The common law developed a number of criminal offenses to punish the wrongful taking of private property.

Larceny

Larceny is the taking and carrying away of the personal property in possession of another without consent and with the intent to permanently deprive another of possession.

Embezzlement

Embezzlement is the conversion of the property of another by an individual who is in lawful possession of the property.

False Pretenses

False pretenses is acquiring the title and possession of the personal property of another by misrepresentation.

Theft

Some states have consolidated property crimes into a single theft statute.

Identity Theft

Knowingly or intentionally obtaining the personal identifying information of another person and the use of or attempt to use the information with fraudulent intent, including to obtain or attempt to obtain credit, goods, services, or medical information in the name of another person.

Computer Crime

A range of computer-related offenses including unauthorized computer access to programs and databases and unlawfully obtaining personal information through deceit and trickery.

Receiving Stolen Property

Receiving stolen property is the taking control of property knowing that it is stolen.

Forgery and Uttering

Forgery is the creation of a false document or the material modification of an existing document with the intent to deceive others. Uttering is the circulating or using of a forged document.

Robbery

Robbery is the taking of property from the person or presence of another by force or intimidation with intent to permanently deprive the owner of possession.

Carjacking

The taking of a motor vehicle in the possession of another, from his or her person or immediate presence, against his or her will, by force or fear.

Extortion

Extortion is acquiring the property of another by the threat of future harm.

Introduction

Seventeenth-century English philosopher John Locke asserted in his influential *Second Treatise on Government* that the protection of private property is the primary obligation of government. Locke argued that people originally existed in a "state of nature" in which they were subject to the survival of the fittest. These isolated individuals, according to Locke, came together and agreed to create and to maintain loyalty to a government that, in return, pledged to protect individuals and to safeguard their private property. Locke, as noted, viewed the protection of private property as the most important duty of government and as the bedrock of democracy.

Locke's views are reflected in the Fifth Amendment to the United States Constitution, which prohibits the taking of property without due process of law. Even today, those individuals who may not completely agree with John Locke recognize that the ownership of private property is a right that provides us with a source of personal enjoyment, pride, profit, and motivation and serves as a measure of self-worth.

A complex of crimes was developed by common law judges and legislators to protect and punish the wrongful taking of private property. As we shall see, each of these crimes was created at a different point in time to fill a gap in the existing law. The development of these various offenses was necessary because prosecutors ran the risk that a defendant would be acquitted in the event that the proof at trial did not meet the technical requirements of a criminal charge. Today, roughly thirty states have simplified the law by consolidating these various property crimes into a single theft statute.

In this chapter, we will review the main property crimes. These include:

- *Larceny.* A pickpocket takes the wallet from your purse and walks away.
- *Embezzlement.* A bank official steals money from your account.
- *False Pretenses.* You sell a car to a friend who lies and falsely promises that he or she will pay you in the morning.
- *Receiving Stolen Property.* You buy a car knowing that it is stolen.
- *Forgery and Uttering.* A friend takes one of your checks, makes it payable to himself or herself, signs your name, and cashes the check at your bank.
- *Robbery.* You are told to hand over your wallet by an assailant who points a loaded gun at you.
- *Extortion.* You are told to pay protection to a gang leader who states that otherwise you will suffer retaliatory attacks in the coming months.

We also will look at the newly developing areas of identity theft, computer crimes, and carjacking. In thinking about the property crimes discussed in this chapter, consider that they all involve the seizure of the property of another individual through either a wrongful taking, fraud, or force.

Larceny

Early English law punished the taking of property by force, a crime that evolved into the offense of robbery. It became apparent that additional protections for property were required to meet the needs of the expanding British economy. Goods now were being produced, transported, bought, and sold. Robbery did not cover acts such as the taking of property under the cover of darkness from a loading dock. Robbery also did not punish employees who stole cash from their employers or a commercial shipper who removed goods from a container that was being transported to the market. Accordingly, the law of larceny was gradually developed to prohibit and punish the nonviolent taking of the property of another without his or her consent.

Common law **larceny** is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive that individual of possession of the property. You should be certain that you understand each element of larceny:

- Trespassory
- taking and

- carrying away of the
- personal property of another with the
- intent to permanently deprive that individual of
- possession of the property.

Actus Reus: Trespassory Taking

The "trespassory taking" in larceny is different from the trespass against land that we earlier discussed when reviewing crimes against habitation. The term *trespassory taking* in larceny is derived from an ancient Latin legal term and refers to a wrongdoer who removes goods (chattel) or money from the possession of another without consent. **Possession** means physical control over property with the ability to freely use and enjoy the property. Consent obtained by force, fraud, or threat is not valid. An Illinois court observes that there "can be no larceny without a trespass, and there can be no trespass unless the property was in the possession of the one from whom it is charged to have been stolen." The common law, as we shall soon see, established various rules to distinguish possession from **custody**, or the temporary and limited right to control property.[1]

As we observed earlier, the law of larceny developed in response to evolving economic conditions in Great Britain. In the fifteenth century, England changed from an agricultural country into a manufacturing center. Industry depended on carriers to transport goods to markets and stores. These carriers commonly would open and remove goods from shipping containers and sell them for personal profit. An English tribunal ruled in the *Carrier's Case,* in 1473, that the carrier was a bailee (an individual trusted with property and charged with a duty of care) who had possession of the container and custody over the contents. The carrier was ruled to be liable for larceny by "break[ing] bulk" and committing a trespassory taking of the contents. How did the judge reach this conclusion? The judge in the *Carrier's Case* reasoned that possession of the goods inside the crate continued to belong to the owner and that the shipper was liable for a trespassory taking when he broke open the container and removed the contents. Of course, the carrier might avoid a charge of larceny by stealing an unopened container.[2]

The law of larceny was also extended to employees. An employee is considered to have custody rather than possession over materials provided by an employer, such as construction tools or a delivery truck. The employer is said to enjoy constructive possession over this property, and an employee who walks away with the tools or truck with the intent to deprive the owner of possession of the tools or truck is guilty of larceny. A college student who drives a pizza delivery truck for a local business has custody over the truck. In the event that the student steals the truck, he or she has violated the owner's possessory right and has engaged in a "trespassory taking."[3]

Larceny is not limited to business and commerce. Professor Perkins notes that when eating in a restaurant, you have custody over the silverware, and removing it from the possession of the restaurant by walking out the door with a knife in your pocket constitutes larceny. Another illustration is a pickpocket who, by removing a wallet from your pocket, has taken the wallet from your possession.[4] Professor Joshua Dressler offers the example of an individual who test drives an automobile at a dealership, returns to the lot, and drives off with the car when the auto dealer climbs out of the vehicle. The test driver would be guilty of larceny for dispossessing the car dealer of the auto.[5] One last, fairly complicated point: do not confuse ownership with possession. When you wait as a jeweler repairs your watch, you retain possession as well as ownership. The jeweler has custody. In the event that you leave the watch with the jeweler for repair, the law says that although you own the watch, the jeweler has possession over the watch until it is returned to you. The jeweler would not be guilty of larceny in the event that he or she refuses to return the watch unless you pay an additional $50.[6]

Asportation

There must be a taking (caption) and movement (asportation) of the property. The movement of the object provides proof that an individual has asserted control and intends to steal the object. You might notice that an individual waiting in line in front of you has dropped his or her wallet. Your intent to steal the wallet is apparent when you place the wallet in your pocket or seize the wallet and walk away at a brisk pace in the opposite direction.

A taking requires asserting "dominion and control" over the property, however briefly. The property then must be moved, and even "a hair's breath" is sufficient.[7] A pickpocket who manages to move a wallet only a few inches inside the victim's pocket may be convicted of larceny.[8]

Larceny may be accomplished through an innocent party. A defendant was convicted of larceny by falsely reporting to a neighbor that the defendant owned the cattle that wandered onto the neighbor's property. The neighbor followed the defendant's instructions to sell the cattle and then turned the proceeds over to the defendant. The defendant was held responsible for the neighbor's caption (taking) and asportation (carrying away), and the defendant was convicted of larceny.[9] A defendant was also found guilty of larceny for unlawfully selling a neighbor's bicycle to an innocent purchaser who rode off with the bike.[10]

Every portion of the property must be moved. An individual who only succeeds in turning a barrel on its side when he was apprehended was not determined to have "carried away" the property.[11]

Various modern state statutes have followed the Model Penal Code in abandoning the requirement of asportation and provide that a person is guilty of theft if he or she "unlawfully takes, or exercises unlawful control" over property. The Texas statute provides that an individual is guilty of larceny where there is an "appropriation of property" without the owner's consent. Under these types of statutes, a pickpocket who reaches into an individual's purse and seizes a wallet would be guilty of larceny; there is no requirement that the pickpocket move or carry away the wallet.[12]

Property of Another

At common law, only tangible personal property was the subject of larceny. Tangible property includes items over which an individual is able to exercise physical control, such as jewelry, paintings, crops and trees removed from the land, and certain domesticated animals. Property not subject to larceny at common law included services (e.g., painting a house), real estate, crops attached to the land, and intangible property (e.g., property that represents something of value such as checks, money orders, credit card numbers, car titles, and deeds demonstrating ownership of property). Crops were subject to larceny only when severed from the land. For instance, an apple hanging on a tree that was removed by a trespasser was part of the land and was not subject to larceny. An apple that fell from the tree and hit the ground, however, was considered to have entered into the possession of the landowner and was subject to larceny. In another example, wild animals that were killed or tamed were transformed into property subject to larceny. Domestic animals, such as horses and cattle, were subject to larceny, but dogs were considered to possess a "base nature" and were not subject to larceny. These categories are generally no longer significant, and all varieties of property are subject to larceny under modern statutes.

The property must be "of another." Larceny is a crime against possession and is concerned with the taking of property from an individual who has a superior right to possess the object. A landlord who removes the furniture from a furnished apartment that he or she rents to a tenant is guilty of larceny.

Modern statutes, as noted, have expanded larceny to cover every conceivable variety of property. For example, the California statute protects personal property, animals, real estate, cars, money, checks, money orders, traveler's checks, phone service, tickets, and computer data.[13]

Mens Rea

The *mens rea* of larceny is the intent to permanently deprive another of the property. There must be a concurrence between the intent and the act. The intent to borrow your neighbor's car is not larceny. It is also not larceny if, after borrowing your neighbor's car, you find that it is so much fun to drive that you decide to steal it. In this example, the criminal intent and the criminal act did not coincide with one another. Several states have so-called joyriding statutes that make it a crime to take an automobile with an intent to use it and then return it to the owner.

Professor LaFave points out that in addition to a specific intent to steal, there are cases holding that larceny is committed when an individual has an intent to deprive an individual of possession for an unreasonable length of time or has an intent to act in a fashion that will probably dispossess a person of the property. For instance, you may drive your neighbor's car from New York to Alaska with the intent of going on a vacation. The trip takes two months and deprives your neighbor of possession for an unreasonable period, which constitutes larceny. After arriving in Alaska, you park and leave the car in a remote area. You did not intend to steal the car, but it is unlikely that the car will be returned to the owner, and you could also be held liable for larceny based on your having acted in a fashion that will likely dispossess the owner of the car. Lost property or property that is misplaced by the owner is subject to larceny when a defendant harbors the intent to steal

at the moment that he or she seizes the property. The defendant is held guilty of larceny, however, only when he or she knows who the owner is or knows that the owner can be located through reasonable efforts. Property is lost when its owner is involuntarily deprived of an object and has no idea where to find or recover it; property is misplaced when the owner forgets where he or she intentionally placed an object. Property that is abandoned has no owner and is not subject to larceny, because it is not the "property of another individual." Property is abandoned when its owner no longer claims ownership. Property delivered to the wrong address is subject to larceny when the recipient realizes the mistake at the moment of delivery and forms an intent to steal the property.

An individual may also claim property "as a matter of right" without committing larceny. This occurs when an individual seizes property that he or she reasonably believes has been taken from his or her possession or seizes money of equal value to the money owed to him or her. In these cases, the defendant believes that he or she has a legal right to the property and does not possess the intent to "take the property of another."

You can see that intent is central to larceny. What if you go to the store to buy some groceries and discover that you left your wallet in the car? You decide to walk out of the store with the groceries and intend to get your wallet and return to the store and pay for the groceries. Is this larceny?

Grades of Larceny

The common law distinguished between **grand larceny** and **petit larceny**. Grand larceny was the stealing of goods worth more than twelvepence, the price of a single sheep. The death penalty applied only to grand larceny.

State statutes continue to differentiate between grand larceny and petit larceny. The theft of property worth more than a specific dollar amount is the felony of grand larceny and is punishable by a year or more in prison. Property worth less than this designated amount is a misdemeanor and is punished by less than a year in prison. States differ on the dollar amount separating petit and grand larceny. South Carolina punishes the theft of an article valued at less than $1,000 as a misdemeanor. Stealing an object worth more than $1,000 but less than $5,000 is subject to five years in prison. Theft of an article valued at $5,000 or more is punishable by ten years in prison.[14] Texas uses the figure of $1,500 to distinguish a theft punishable as a misdemeanor from a theft punishable as a felony. Harsher punishment is imposed as the value of the stolen property increases.[15]

How is property valued? In the case of the theft of money or of a check made out for a specific amount, this is easily calculated. What about the theft of an automobile? Should this be measured by what the thief believes is the value of the property? The Pennsylvania statute is typical and provides that "value means the market value of the property at the time and place of the crime." Courts often describe this as the price at which the mind of a willing buyer and a willing seller would meet.

The application of this test means that judges will hear evidence concerning how much it would cost to purchase a replacement for a stolen car. What about a basketball jersey worn and autographed by megastar Michael Jordan? You cannot go to the store and purchase this item. The Pennsylvania statute states that if the market value "cannot be satisfactorily ascertained, [the value of the property is] the cost of replacement of the property within a reasonable time after the crime." In other words, the court will hear evidence concerning the value of a Michael Jordan autographed jersey in the same condition as the jersey that was stolen. One difficulty is that courts consider the absolute dollar value of items and do not evaluate the long-term investment or sentimental value of the property.[16] The Pennsylvania statute also provides that when multiple items are stolen as part of a single plan or through repeated acts of theft, the value of the items may be aggregated or combined. This means that the money taken in a series of street robberies will be combined and that the perpetrator will be prosecuted for a felony rather than a series of misdemeanors.[17]

The value of property is not the only basis for distinguishing between grand and petit larceny. California uses the figure of $400 to distinguish between grand and petit larceny and categorizes as grand larceny the theft of "domestic fowls, avocados, olives, citrus or deciduous fruits . . . vegetables, nuts, artichokes, or other farm crops" of a value of more than $100. California also considers grand larceny to include the theft of "fish, shellfish, mollusks, crustaceans, kelp, algae . . . taken from a commercial or research operation."[18]

Theft of a firearm, theft of an item from the "person of another," and theft from a home all pose a danger to other individuals and are typically treated as grand larceny.[19] The penalty for stealing property may be increased where the stolen items belong to an "elderly individual" or to the government.[20]

The next case, *People v. Gasparik,* discusses the point at which an individual has exercised sufficient control over property in a store to be convicted of shoplifting. This difficult issue illustrates the challenge of adjusting the law of larceny to meet new developments.

The Statutory Standard

The Mississippi statute follows the common law of larceny.

Mississippi Code Section 97–17–41. Grand Larceny

(1) Every person who shall be convicted of taking and carrying away, feloniously, the personal property of another, of the value of Five Hundred Dollars . . . or more, shall be guilty of grand larceny, and shall be imprisoned . . . for a term not exceeding ten . . . years; or shall be fined not more than Ten Thousand Dollars . . . or both.

(2) Every person who shall be convicted of taking and carrying away, feloniously, the property of a church synagogue, temple or other established place of worship, of the value of Five Hundred Dollars . . . or more, shall be guilty of grand larceny, and shall be imprisoned . . . for a term not exceeding ten . . . years, or shall be fined not more than Ten Thousand Dollars . . . or both.

The Legal Equation

Larceny = Unlawful taking and carrying away + intent to permanently deprive another of property.

Is a defendant who never leaves the store guilty of shoplifting?

People v. Gasparik, *420 N.E.2D 40 (N.Y. 1978),* Opinion by: Cook, J.

Facts

Defendant was in a department store trying on a leather jacket. Two store detectives observed him tear off the price tag and remove a "sensormatic" device designed to set off an alarm if the jacket were carried through a detection machine. There was at least one such machine at the exit of each floor. Defendant placed the tag and the device in the pocket of another jacket on the merchandise rack. He took his own jacket, which he had been carrying with him, and placed it on a table. Leaving his own jacket, defendant put on the leather jacket and walked through the store, still on the same floor, bypassing several cash registers. When he headed for the exit from that floor, in the direction of the main floor, he was apprehended by security personnel. At trial, defendant denied removing the price tag and the sensormatic device from the jacket and testified that he was looking for a cashier without a long line when he was stopped. The court, sitting without a jury, convicted defendant of petit larceny. Appellate Term affirmed.

Issue

The primary issue in this case is whether the evidence, viewed in the light most favorable to the prosecution, was

sufficient to establish the elements of larceny as defined by the Penal Law. To resolve this common question, the development of the common law crime of larceny and its evolution into modern statutory form must be briefly traced.

Reasoning

Larceny at common law was defined as a trespassory taking and carrying away of the property of another with intent to steal it. The early common law courts apparently viewed larceny as defending society against breach of the peace, rather than protecting individual property rights, and therefore placed heavy emphasis upon the requirement of a trespassory taking. Thus, a person . . . who had rightfully obtained possession of property from its owner could not be guilty of larceny. The result was that the crime of larceny was quite narrow in scope. One popular explanation for the limited nature of larceny is the "unwillingness on the part of the judges to enlarge the limits of a capital offense." The accuracy of this view is subject to some doubt.

Gradually, the courts began to expand the reach of the offense, initially by subtle alterations in the common law concept of possession. Thus, for instance, it became a general rule that goods entrusted to an employee were not deemed to be in his possession but were only considered to be in his custody, so long as he remained on the employer's premises. And . . . it was held that a shop owner retained legal possession of merchandise being examined by a prospective customer until the actual sale was made. In these situations, the employee and the customer would not have been guilty of larceny if they had first obtained lawful possession of the property from the owner. By holding that they had not acquired possession, but merely custody, the court was able to sustain a larceny conviction.

As the reach of larceny expanded, the intent element of the crime became of increasing importance, while the requirement of a trespassory taking became less significant. As a result, the bar against convicting a person who had initially obtained lawful possession of property faded. In *King v. Pear* (168 Eng. Rep. 208), for instance, a defendant who had lied about his address and ultimate destination when renting a horse was found guilty of larceny for later converting the horse. Because of the fraudulent misrepresentation, the court reasoned, the defendant had never obtained legal possession. Thus, "larceny by trick" was born. . . .

Section 155.05 of the New York Penal Law defines larceny: (1) A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains, or withholds such property from an owner thereof. (2) Larceny includes a wrongful taking, obtaining, or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways: (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses.

This evolution is particularly relevant to thefts occurring in modern self-service stores. In stores of that type, customers are impliedly invited to examine, try on, and carry about the merchandise on display. Thus, in a sense, the owner has consented to the customer's possession of the goods for a limited purpose. That the owner has consented to that possession does not, however, preclude a conviction for larceny. If the customer exercises dominion and control wholly inconsistent with the continued rights of the owner, and the other elements of the crime are present, a larceny has occurred. Such conduct on the part of a customer satisfies the "taking" element of the crime.

Also required, of course, is the intent prescribed by subdivision 1 of section 155.05 of the Penal Law and some movement when property other than an automobile is involved. As a practical matter, in shoplifting cases, the same evidence that proves the taking will usually involve movement.

The movement, or asportation, requirement has traditionally been satisfied by a slight moving of the property. This accords with the purpose of the asportation element, which is to show that the thief had indeed gained possession and control of the property. It is this element that forms the core of the controversy in these cases. The defendants argue, in essence, that the crime is not established, as a matter of law, unless there is evidence that the customer departed the shop without paying for the merchandise.

Although this court has not addressed the issue, case law from other jurisdictions seems unanimous in holding that a shoplifter need not leave the store to be guilty of larceny. This is because a shopper may treat merchandise in a manner inconsistent with the owner's continued rights—and in a manner not in accord with that of a prospective purchaser—without actually walking out of the store. Indeed, depending upon the circumstances of each case, a variety of conduct may be sufficient to allow the trier of fact to find a taking. It would be wellnigh impossible, and unwise, to attempt to delineate all the situations that would establish a taking. But it is possible to identify some of the factors used in determining whether the evidence is sufficient to be submitted to the fact finder.

In many cases, it will be particularly relevant that the defendant concealed the goods under clothing or in a container. Such conduct is not generally expected in a self-service store and may in a proper case be deemed an exercise of dominion and control inconsistent with the store's continued rights. Other furtive or unusual behavior on the part of the defendant should also be weighed. Thus, if the defendant surveys the area while secreting the merchandise or abandons his or her own property in exchange for the concealed goods, this may evince larcenous rather than innocent behavior. Relevant too is the customer's proximity to or movement towards one of the

store's exits. Certainly, it is highly probative of guilt that the customer was in possession of secreted goods just a few short steps from the door or moving in that direction. Finally, possession of a known shoplifting device actually used to conceal merchandise, such as a specially designed outer garment or a false-bottomed carrying case, would be all but decisive.

Of course, in a particular case, any one or any combination of these factors may take on special significance. And there may be other considerations, not now identified, which should be examined. So long as it bears upon the principal issue—whether the shopper exercised control wholly inconsistent with the owner's continued rights—any attending circumstance is relevant and may be taken into account.

Under these principles, there was ample evidence . . . to raise a factual question as to the defendant's guilt. . . . As discussed, the same evidence that establishes dominion and control in these circumstances will often establish movement of the property. And the requisite intent generally may be inferred from all the surrounding circumstances. It would be the rare case indeed in which the evidence establishes all the other elements of the crime but would be insufficient to give rise to an inference of intent.

The defendant removed the price tag and sensor device from a jacket, abandoned his own garment, put the jacket on, and ultimately, headed for the main floor of the store. Removal of the price tag and sensor device, and careful concealment of those items, is highly unusual and suspicious conduct for a shopper. Coupled with defendant's abandonment of his own coat and his attempt to leave the floor, those factors were sufficient to make out a prima facie case of a taking.

Holding

In sum, in view of the modern definition of the crime of larceny, and its purpose of protecting individual property rights, a taking of property in the self-service store context can be established by evidence that a customer exercised control over merchandise wholly inconsistent with the store's continued rights. Quite simply, a customer who crosses the line between the limited right he or she has to deal with merchandise and the store owner's rights may be subject to prosecution for larceny. Such a rule should foster the legitimate interests and continued operation of self-service shops, a convenience that most members of the society enjoy. Accordingly, in each case, the verdict at trial should be affirmed.

Questions for Discussion

1. Apply the common law of larceny. Would Gasparik be guilty?
2. What is the difficulty of applying the law of larceny to the "modern service store"? Consider the challenge of proving a "taking" and a felonious intent. What types of facts does the court point to as establishing a criminal intent and a taking?
3. Would it be advisable to require store security to wait until an individual walks past the cashier or exits the store before detaining a customer for shoplifting?

You Decide

13.1 Jesus O., a juvenile, was charged under California law with grand theft "from the person" of a cellular telephone. Mario H. and three middle school friends left a fast food restaurant in Van Nuys, California. Jesus O. and Roberto A. followed and confronted them in an alley and announced "Assassin Kings." They asked Mario if he had any money, and Mario explained that he did not have any money. Jesus suddenly "sucker punched" one of Mario's friends in the mouth, and a fight ensued. At one point during the scuffle, Roberto pulled out a knife and threatened to "shank" Mario. Mario and his friends fled down the alley and jumped over a fence. Roberto found Mario's cellular telephone lying in the alley, and Roberto picked it up and placed it in his pocket. Jesus and Roberto were both convicted of grand theft (and attempted robbery). The court of appeals held that the cellular telephone was not taken from Mario's "person" and reduced Jesus's conviction to petty theft. California divides theft into petty theft and grand theft. Grand theft includes property taken from the person of another. The California Supreme Court was asked to determine whether Jesus had stolen the telephone "from the person" of Mario. In *People v. McElroy,* 48 P. 718 (1897), an important precedent in California on this question, the victim had taken his trousers off and was using them as a pillow. The defendant took the money from the trousers while the victim slept. The supreme court reversed the defendant's conviction, holding that the "money was no more on [the victim's] person . . . than if it had been concealed under his bed or elsewhere about it, or left in his clothes upon a chair or hanging on the wall." As a judge, how would you rule in this case? See *People v. Jesus O.,* 152 P.3d 1100 (Cal. 2007).

You can find the answer at www.sagepub.com/lippmanccl2e

Embezzlement

For a deeper look at this topic, visit the study site.

We have seen that larceny requires a taking of property from the possession of another person with the intent to permanently deprive the person of the property. In the English case of *Rex v. Bazeley,* in 1799, a bank teller dutifully recorded a customer's deposit and then placed the money in his pocket. The court ruled that the teller had taken possession of the note and that he therefore could not be held convicted of larceny and ordered his release from custody. The English Parliament responded by almost immediately passing a law that held servants, clerks, and employees criminally liable for the fraudulent misdemeanor of embezzlement of property. Today, embezzlement is a misdemeanor or felony depending on the value of the property.[21]

The law of **embezzlement** has slowly evolved, and although there is no uniform definition of embezzlement, the core of the crime is the fraudulent conversion of the property of another by an individual in lawful possession of the property. The following elements are central to the definition of the crime:

> *Fraudulent* (deceitful) *conversion of* (the serious interference with the owner's rights) *the property* (statutes generally follow the law of larceny in specifying the property subject to embezzlement) *of another* (you cannot embezzle your own property) *by an individual in lawful possession of the property* (the essence of embezzlement is wrongful conversion by an individual in possession).

The distinction between larceny and embezzlement rests on the fact that in embezzlement, the perpetrator lawfully takes possession and then fraudulently converts the property. In contrast, larceny involves the unlawful trespassory taking of property from the possession of another. Larceny requires an intent to deprive an individual of possession at the time that the perpetrator "takes" the property. The intent to fraudulently convert property for purposes of embezzlement, however, may arise at any time after the perpetrator takes possession of the property.

Typically, embezzlement is committed by an individual to whom you entrust your property. Examples would be a bank clerk who steals money from the cash drawer, a computer repair technician who sells the machine that you left to be repaired, or a construction contractor who takes a deposit and then fails to pave your driveway or repair your roof. Embezzlement statutes are often expressed in terms of "property which may be the subject of larceny." In some states, embezzlement is defined to explicitly cover personal as well as real property (e.g., land).

The next case, *State v. Robinson,* provides a review of the elements of embezzlement. Ask yourself whether the defendant was in lawful possession of the merchandise in the store.

The Statutory Standard

South Dakota Laws Section 22–30A-10. Misappropriation of Property Held in Trust

Any person, who has been entrusted with the property of another and who, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of his or her trust, is guilty of theft. . . .

Model Penal Code

Section 223.2. Theft by Unlawful Taking or Disposition

(1) Movable Property. A person is guilty of theft if he unlawfully takes or exercises unlawful control over movable property of another with purpose to deprive him thereof.

(2) Immovable Property. A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

Analysis

- The Model Penal Code consolidates larceny and embezzlement.
- The phrase "unlawfully takes" is directed at larceny, while the exercise of "unlawful control" over the property of another is directed at embezzlement. In both instances, the defendant must be shown to possess an intent to "deprive" another of the property. This includes an intent to permanently deprive the other individual of the property as well as treating property in a manner that deprives another of its use and enjoyment.
- Property is broadly defined to include "anything of value," including personal property, land, services, and real estate.
- Asportation is not required for larceny.
- Combining larceny and embezzlement means that the prosecution is able to avoid the confusing issues of custody and possession. The "critical inquiry" is "whether the actor had control of the property, no matter how he got it, and whether the actor's acquisition or use of the property was authorized."

The Legal Equation

Can a store clerk be held liable for embezzlement?

State v. Robinson, *603 S.E.2d 345 (Ct. App. N.C. 2004),* *Opinion by: Timmons-Goodson, J.*

Tikelia Robinson ("defendant") appeals her conviction of embezzlement. For the reasons stated herein, we find no error in the trial court's judgment.

Facts

The State's evidence presented at trial tends to show the following: On April 3, 2000, defendant was hired as a merchandise associate at TJ Maxx Department Store ("TJ Maxx") in Rocky Mount, North Carolina. In September 2000, Dwayne Gooding ("Gooding"), a loss-prevention detective for TJ Maxx, received information from transaction reports and store employees that defendant may have been selling merchandise for less than the marked price. On September 21, 2000, Gooding interviewed defendant, at which time she provided a written confession that during her employment, she engaged in "underringing," "free bagging," and "markdown fraud." "Underringing" occurs when an employee receives merchandise from a customer for purchase, and the employee keys in a price on the cash register lower than the price stated on the price tag. "Free bagging" occurs when a customer presents multiple items for purchase at a cash register and the employee rings up fewer than all of the items but places all of the items in a bag for the customer to take from the store. "Markdown fraud" occurs when an employee takes an item from the sales floor to a markdown machine, creates a price tag for the item that is lower than the true price of the item, and then purchases the item at the lower price. Defendant admitted to underringing and free bagging $15,000 in merchandise. She further admitted purchasing and selling to other employees $20,000 in merchandise by way of markdown fraud.

Defendant was arrested and charged with one count of embezzlement and tried before a jury on June 11, 2003. . . . The jury convicted defendant of embezzlement, and the trial court sentenced her to a suspended sentence of forty-eight months supervised probation on the condition that she pay an undetermined probation supervision fee, $250 in court costs, a $1,000 fine, and $20,000 in restitution. It is from this conviction that defendant appeals. . . .

The General Statutes of North Carolina provide as follows with respect to embezzlement:

> If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any

> other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant . . . shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels . . . which shall have come into his possession or under his care, he shall be guilty of a felony.

In the present case, Gooding and Cynthia Taylor ("Taylor"), an assistant manager at the store, testified that a merchandise associate is the same as a store clerk. Clearly, clerks are among the group of persons that the legislature intended to cover by the statute. Thus, we conclude that the trial court properly instructed the jury that embezzlement can occur "when a merchandise associate rightfully receives property in her role as a merchandise associate and then intentionally, fraudulently and dishonestly uses it for some purpose . . . other than that for which she received it." . . .

Issue

Defendant . . . argues that the trial court erred by denying defendant's motion to dismiss. We disagree.

To survive a motion to dismiss a charge of embezzlement, the State must have presented evidence of the following:

> (1) Defendant was the agent of the complainant; (2) pursuant to the terms of his employment, he was to receive property of his principal; (3) he received such property in the course of his employment; and (4) knowing it was not his, he either converted it to his own use or fraudulently misapplied it.

Reasoning

The term "agent" is defined as "one who is authorized to act for or in place of another; a representative." . . . In the present case, the evidence establishes that defendant was an agent of TJ Maxx. Gooding and Taylor testified that TJ Maxx authorized defendant to sell its merchandise to customers. As a merchandise associate or sales clerk authorized to conduct sales transactions on behalf of the company, defendant was an agent of TJ Maxx. Thus, the first element of embezzlement analysis is satisfied.

The evidence also tends to show that pursuant to the terms of defendant's employment, she was to receive, and did receive, property belonging to TJ Maxx. Gooding and Taylor testified that all store employees, including defendant, are entrusted with the merchandise in the store. Thus, the second and third elements of embezzlement analysis are satisfied.

The evidence further demonstrates that defendant knew that the merchandise was not hers, converted it to her own use, or fraudulently sold some of the merchandise. In defendant's handwritten confession, as read into evidence by Gooding, defendant confesses the following: "Since my employment at TJ Maxx I have been involved in underringing, free bagging, and markdown fraud"; "I intentionally gave away merchandise about 300 times over a 4 to 5 month period"; "I knew this was wrong and against company policy and against the law." Thus, the fourth element of embezzlement analysis is satisfied.

Holding

Because the State provided substantial evidence of each offense charged, we conclude that the trial court properly denied defendant's motion to dismiss.

Questions for Discussion

1. Explain the court's conclusion that the facts satisfy the elements of embezzlement. What three types of acts committed by the defendant were alleged to constitute embezzlement?
2. Did the defendant as well as the store manager possess the clothes?
3. Why is the defendant charged with one count of embezzlement given that she "gave away merchandise about 300 times over a 4 to 5 month period"? Did the defendant engage in a single coherent scheme?

You Decide

13.2 Archer was convicted of embezzlement by a New Mexico jury and appealed to the court of appeals. At the time of his offense, Archer was on probation and was required to remain within 150 feet of his telephone. As a condition of probation, Archer signed a statement agreeing to wear an electronic monitoring device (EMD) around his ankle, which communicated electronically with a computer connected to his telephone. This enabled probation authorities to confirm that Archer was at home and close by the telephone. Archer removed the EMD, damaging the device, and threw it into a field. In New Mexico, embezzlement involves an individual's "converting to his own use . . . anything of value, which he has been entrusted, with fraudulent intent to deprive the owner thereof." Would you affirm Archer's conviction for embezzlement? See *State v. Archer,* 943 P.2d 537 (N.M. App. 1997).

You can find the answer at www.sagepub.com/lippmanccl2e

False Pretenses

Larceny punishes individuals who "take and carry away" property from the possession of another with the intent to permanently deprive the individual of the property. Obtaining possession through misrepresentation or deceit is termed **larceny by trick**. In both larceny and larceny by trick, the wrongdoer unlawfully seizes and takes your property.

Embezzlement punishes individuals who fraudulently "convert" to their own use the property of another that the embezzler has in his or her lawful possession. In other words, you trusted the wrong person with the possession of your property.

Common law judges confronted a crisis when they realized that there was no criminal remedy against individuals who tricked another into transferring title or ownership of personal property or land. Consider the case of an individual who trades a fake diamond ring that he or she falsely represents to be extremely valuable in return for a title to farmland.

The English Parliament responded, in 1757, by adopting a statute punishing an individual who "knowingly and designedly" by false pretense shall "obtain from any person or persons money, goods, wares or merchandise with intent to cheat or defraud any person or persons of the same." American states followed the English example and adopted similar statutes.

State statutes slightly differ from one another in their definitions of false pretenses. The essence of the offense is that a defendant is guilty of **false pretenses** who:

- Obtains title and possession of property of another by
- a knowingly false representation of
- a present or past material fact with
- an intent to defraud that
- causes an individual to pass title to his or her property.

Actus Reus

The *actus reus* of false pretenses is a false representation of a fact. The expression of an opinion or an exaggeration ("puffing"), such as the statement that this is a "fantastic buy," does not constitute false pretenses. The most important point to remember is that the false representation must be of a past (this was George Washington's house) or present (this is a diamond ring) fact. A future promise does not constitute false pretenses ("I will pay you the remaining money in a year"). Why? The explanation is that it is difficult to determine whether an individual has made a false promise, whether an individual later decided not to fulfill a promise, or whether outside events prevented the performance of the promise. Prosecuting individuals for failing to fulfill a future promise would open the door to individuals' being prosecuted for failing to pay back money they borrowed or might result in business executives being held criminally liable for failing to fulfill the terms of a contract to deliver consumer goods to a store. The misrepresentation must be material (central to the transaction; the brand of the tires on a car is not essential to a sale of a car) and must cause an individual to transfer title. It would not be false pretenses where a buyer knows that the seller's claim that a home has a new roof is untrue or where the condition of the roof is irrelevant to the buyer.

Silence does not constitute false pretenses. A failure to disclose that a watch that appears to be a rare antique is in reality a piece of costume jewelry is not false pretenses. The seller, however, must disclose this fact in response to a buyer's inquiry as to whether the jewelry is an authentic antique.

Mens Rea

The *mens rea* of false pretenses requires that the false representation of an existing or past fact be made "knowingly and designedly" with the "intent to defraud." This means that an individual knows that a statement is false and makes the statement with the intent to steal. A defendant who sells a painting for an exorbitant price that he or she mistakenly or unreasonably believes was painted by Elvis Presley is not guilty of false pretenses.

"Recklessness" or representations made without information, however, are typically sufficient for false pretenses. Representing that a painting was made by Elvis Presley when you are uncertain or are aware that you have no firm basis for such a representation would likely be sufficient for false pretenses.

In other words, the intent requirement is satisfied by *knowledge* that a representation is untrue, an *uncertainty* whether a representation is true or untrue, or an *awareness* that one lacks sufficient knowledge to determine whether a representation is true or false.

Defendants are not considered to possess an intent to defraud a victim out of property when they reasonably believe that they actually own or are entitled to own the property. You cannot steal what you believe you are entitled to own.

Keep in mind that when possession passes to an individual and the owner retains the title, the defendant is guilty of larceny by trick rather than false pretenses. An individual who obtains the permission of an auto dealer to take a car for a drive and intends to and, in fact, does steal the car is guilty of larceny by trick. Obtaining the title to the car with a check that the buyer knows will "bounce" constitutes false pretenses. Another important difference is that larceny requires a taking and carrying away of the property. False pretenses requires only a transfer of title and possession.

False pretenses generally has been interpreted to include a wider variety of property than larceny and includes the acquisition of lodging, labor (washing your car), and services (telephone). The next case, *State v. Henry,* asks whether you may be convicted of obtaining sexual gratification through false pretenses.

The Statutory Standard

Can you explain the relationship between this Vermont statute on "antiquities and rarities" and false pretenses?

Vermont Statutes Section 2023. Simulating Objects of Antiquity or Rarity

A person who, with the purpose of defrauding anyone or with the knowledge that he is facilitating a fraud to be perpetrated by anyone, makes or alters any object so that it appears to have value because of antiquity, rarity, source or authorship which it does not possess shall be imprisoned for not more than one year or fined not more than $1,000.00 or both.

Model Penal Code

Section 223.3. Theft by Deception

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

(1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;

(2) prevents another from acquiring information which would affect his judgment of a transaction;

(3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship;

(4) fails to disclose a lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

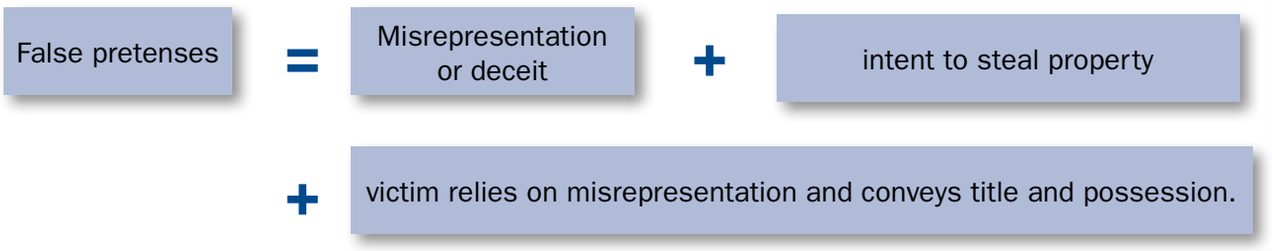
The term "deceive" does not, however, include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group possessed.

Analysis

- The term *deception* is substituted for "false pretense or misrepresentation."
- The defendant must possess the intent to defraud. This entails a purpose to obtain the property of another and the purpose to deceive the other person.

- The act requirement is satisfied by a misrepresentation as well as by reinforcing faulty information. False future promises are considered to constitute false pretenses.
- There is no duty of disclosure other than when the defendant contributes to the creation of a false impression or where the defendant has a duty of care toward the victim (fiduciary or confidential relationship) or there is a legal claim on the property. A seller also may not interfere (destroy or hide) information.
- False pretenses does not include a misrepresentation that has no significance in terms of the value of the property (e.g., the political or religious affiliation of a salesperson) or puffing or nondisclosure.

The Legal Equation



Did the defendant use false pretenses to obtain sexual gratification?

State v. Henry, *68 P.3D 455 (ARIZ. CT. APP. 2003),* Opinion by: Howard, J.

Tyrone Henry was convicted of fraudulent scheme and artifice and sentenced to prison. He argues the trial court erred in denying his motion for judgment of acquittal. Finding no abuse of discretion or other reversible error, we affirm.

Facts

In June 2000, Henry approached the victims, fifteen-year-old K. and sixteen-year-old C., at a shopping mall. He claimed to be marketing a new face cream, asked the victims whether they used face creams, and showed them photographs of females with "clumpy," white cream on their faces. Henry said he was conducting a survey of the face cream, using females ages twelve to twenty-five, and appeared to write the victims' responses to questions he asked them about lotions they used. He asked the victims if they would like to further participate in the survey by having facials, offering them $10 each to do so. The victims made an appointment to have facials the next day. Henry telephoned the victims the next day and gave them directions to his apartment. The victims took a male friend along to the apartment, but Henry requested that the friend remain outside during the facials, claiming Henry and the victims "had to talk about secret traits that were in the facial cream." After the friend agreed, the victims entered the living room of Henry's small apartment, and he asked K. to lie on a bed and C. to lie on a couch near the bed.

Wearing cotton shorts and a T-shirt, Henry placed small caps and a bandanna over K.'s eyes and told her she would go blind if any of the face cream got in her eyes. K. felt him brush a substance on her face and then heard him clicking the mouse on his computer. With her eyes still covered, K. then heard heavy breathing and heard Henry telling C., "it's coming soon," and after that, "it spilt." K. then saw camera flashes after Henry said he was going to take photographs. K. heard Henry walking behind her where C. was lying, and then felt him place a thick, warm substance on K.'s face with his hands. Henry had told K. he would warm the treatment cream in a microwave oven, but she never heard a microwave oven activated. Shortly thereafter, Henry removed the bandanna and caps and gave K. and C. towels to wipe their faces. When K. sat up to wipe her face, she saw "white stuff" on C.'s chin that was "real thick . . . [and] clumped up."

Henry had not covered C.'s eyes but had told her to keep them closed, claiming the applications to her face would burn her eyes. Henry had taken a "before" photograph and had applied two substances to C.'s face with his hands and had taken more photographs. He then had told C. to "hold on because the thick treatment was going to come in just a second." Without feeling Henry's hands, C. had then felt "something . . . warm . . . just

[go] all over [her] face" and shirt and had then noticed camera flashes.

Before the victims left the apartment, Henry asked them "how did it feel," giving them a $20 bill. He also asked if they wanted to make another appointment. The victims made another appointment and left with their friend. The victims thereafter discussed what had happened and, based on their suspicions that Henry had ejaculated on C.'s face, contacted the police.

Police officers interviewed the victims and collected C.'s T-shirt. After receiving crime laboratory test results showing the possible presence of semen on the shirt, which deoxyribonucleic acid (DNA) testing later confirmed as Henry's, police searched his apartment. The search did not produce any indication that Henry had been conducting legitimate face cream testing, but police found a day planner with the victims' names in it, along with the names of numerous other females, and sections marked "site" and "White Dew Facials." Officers seized a computer, a scanner, and 300 to 500 photographs, many of them depicting females involved in situations similar to that the victims had described. Officers also found one photograph of C. on an undeveloped roll of film resembling one of the earlier photographs Henry had taken during the incident. Police discovered that Henry was operating a pornographic Internet website titled, "White Dew Original Facials," on which he would charge visitors between $10 and $90 to view images of females with semen on their faces.

The state charged Henry with two counts of kidnapping and one count of fraudulent scheme and artifice. At trial, in addition to the victims, M., whose name had been found in Henry's day planner and photographs of whom had been recovered from Henry's apartment, testified that about two years earlier, she had responded to an advertisement in which Henry had offered money for females to participate in a face cream experiment. She testified that she had made an appointment with Henry and had gone to his apartment. She said Henry had covered her eyes, telling her that the cream would burn her eyes, had surreptitiously ejaculated on her face, and had taken photographs. Tests conducted on a stain from a sweater M. had worn during the incident produced results consistent with Henry's semen.

In his defense, Henry called several females, who testified they had gone to Henry's apartment and had willingly posed for photographs with Henry's semen on their faces, which they had understood would be used on Henry's website. They testified that Henry had paid them as much as $100 per hour for posing for the photographs. During closing argument, Henry suggested that he, in fact, had been engaged in legitimate skin cream testing, that the semen found on C.'s shirt could have been transferred there from the towel she had used to clean her face at Henry's apartment, and that M. had shown up for a face treatment, had flirted with Henry, and had wanted to "play around with some other things."

The trial court granted Henry's motion for judgment of acquittal on the kidnapping charges but denied it on the fraudulent scheme count. The jury found Henry guilty, and the court imposed a presumptive, five-year prison sentence, which the court enhanced by two years after Henry admitted having committed the offense while on release for an unrelated offense.

Issue

Henry argues the trial court erred in denying his motion for judgment of acquittal. . . . The jury found Henry guilty of fraudulent scheme and artifice, in violation of A.R.S. section 13–2310(A), which prohibits a person from, "pursuant to a scheme or artifice to defraud, knowingly obtaining any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." For purposes of section 13–2310(A), "a 'scheme or artifice' is some 'plan, device, or trick' to perpetrate a fraud." "The scheme need not be fraudulent on its face but 'must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.'" The term "defraud" as used in the statute is not measured by any technical standard but, rather, by a "broad view." A "benefit" under the statute is "anything of value or advantage, present or prospective."

Henry argues no substantial evidence supports the conviction because sexual gratification does not qualify as a requisite "benefit" under section 13–2310, contrary to the state's argument to the jury. Henry urges that "benefit" as found in section 13–2310 applies only to property and pecuniary gains, not to anything as intangible as sexual gratification. We agree with the state that in this case, sexual gratification does qualify as a benefit under section 13–2310.

Reasoning

The legislative history and language of section 13–2310 support our result. As originally enacted, the language of section 13–2310 . . . stated that a person was guilty of fraudulent schemes and artifices by fraudulently obtaining "money, property or any other thing of value." However, two years later, the legislature aimed for a broader scope, amending section 13–2310 by replacing the clause "property or any other thing of value" with the more inclusive "any benefit." And the legislature did not define "benefit" in section 13–2301. . . . Rather, "benefit" is defined among the definitions for the entire criminal code in section 13–105 and includes "anything of value or advantage," not merely pecuniary gain. Accordingly, we believe the legislature intended "benefit" as used in section 13–2310 to have a broad definition and did not intend to exclude sexual gratification.

Pertinent case law also supports our decision. Although no state case addresses whether sexual gratification qualifies as a benefit under section 13–2310, we find illuminating our supreme court's decision in *Haas*. There, the court addressed the scope of the language in section

13–2310 pertaining to fraud. Although it did not address what qualifies as a benefit, the court concluded, in overriding the defendant's attempt to limit the scope of section 13–2310, that "if the legislature had intended section 13–2310 to be broad enough to cover all of the varieties made possible by boundless human ingenuity," then it did not intend to confine the definition of "benefit" to include only pecuniary gain. . . .

Nevertheless, if we accept the State's position, Henry foresees a "slippery slope" where a broad range of noncommercial and intangible benefits may become the bases for criminal prosecution. He likens the State's position to criminalizing a "practical joke gone awry" and the "'benefit' of laughter" attending it. But the context of Henry's scheme was commercial, a face cream survey and sample application, and not the type of noncommercial activity that troubles Henry. . . . Henry has not pointed out any statute criminalizing practical jokes. We need not decide the maximum reach of section 13–2310 today but only that Henry's conduct falls within the legislative intent. . . .

Holding

Having concluded that sexual gratification qualifies as a benefit under section 13–2310, we return to Henry's claim that substantial evidence did not support his conviction. Henry operated a pornographic website on which he charged visitors money to view photographs of females with semen on their faces. He paid some females up to $100 per hour to willingly pose for such photographs. Henry approached the victims claiming to be conducting a face cream survey and offered them $10 each to have "facials." The victims testified that they had scheduled an appointment with Henry believing they were participating in a legitimate face cream survey and would, in fact, receive a facial. The evidence supports the conclusion that with the victims' eyes covered or closed, Henry ejaculated on C.'s face and took photographs, in a manner resembling the subterfuge he had employed with M. two years before. No evidence showed that Henry was associated with any legitimate face cream enterprise.

Construed in a light supporting the conviction, the evidence supporting the conviction is substantial. The jury could infer beyond a reasonable doubt that pursuant to a scheme to defraud and through false pretenses, Henry had obtained a benefit through sexual gratification or by an intent to post photographs of C. on his website for profit while paying her substantially less than he did consenting models. . . . Henry points out there was no evidence C.'s photograph was ever posted on his website. But the benefit need be prospective only. And, although Henry argues that the jury was required to find the value of the benefit obtained by the fraudulent scheme, the portion of section 13–2310 under which Henry was convicted contains no such requirement. . . . We affirm Henry's conviction and sentence.

Questions for Discussion

1. Would Henry's scheme be punishable as false pretenses had the Arizona statute on false pretenses not been amended? Why is Henry's scheme punishable under the text of the current statute? Did Henry obtain a "benefit"?
2. What is Henry's defense? What did he mean when he contended that a practical joke under the court's interpretation could be interpreted as a crime? Are the arguments of the court or of the defendant more persuasive?
3. As a prosecutor, would you have charged Henry with false pretenses?

You Decide

13.3 Ronald Nellon inherited $142,409. He is described as possessing an obviously "subnormal intellectual capacity." During a period of roughly five weeks in 1992, Nellon purchased six trucks from the general manager of Quirk Chevrolet in Braintree, Massachusetts. Nellon would purchase a truck and soon thereafter "trade it in" for a more expensive truck, receiving far less than he paid in the trade-in. For instance, on July 9, 1992, Nellon received a trade-in allowance of $5,876 on a truck that he bought the previous day for $14,625. The odometer read 26 miles. The dealership's profit margin was $4,313. The next day, he received a trade-in allowance of $5,530 on a truck that he purchased the day before for $13,818. The odometer read 20 miles, and the profit came to $5,085.

Reske, the general manager of the auto dealership, was charged with false pretenses. The court ruled that a false statement may be inferred from the "inordinate profit margin . . . the manifestly unrealistic trade-in allowances, and from the inflation over sticker prices," all of which were contrary to customary practice. Nellon overpaid roughly $23,651 on the six transactions. Was Reske guilty of false pretenses? Was he guilty of larceny by trick? Note that a Florida statute makes it a crime to obtain or use the funds of an elderly or disabled person if the accused "knows or reasonably should know the elderly person or disabled adult lacks the capacity to consent." See *Commonwealth v. Reske,* 684 N.E.2d 631 (Mass. Ct. App. 1997).

You can find the answer at www.sagepub.com/lippmanccl2e

Theft

A number of states have consolidated larceny, embezzlement, and false pretenses into a single **theft statute**. The Model Penal Code and several state provisions also include within their theft statutes the property offenses of receiving stolen property, blackmail or extortion, the taking of lost or mistakenly delivered property, theft of services, and the unauthorized use of a vehicle.

Larceny, embezzlement, and false pretenses are all directed against wrongdoers who unlawfully interfere with the property interests of others, whether through "taking and asportation," "converting," or "stealing." The commentary to the Model Penal Code explains that each of these property offenses involves the "involuntary" transfer of property, and in each instance, the perpetrator "appropriates property of the victim without his consent or with a consent that is obtained by fraud or coercion."[22]

How do these consolidated theft statutes make it easier for prosecutors to charge and convict defendants of a property offense? A prosecutor under these consolidated theft statutes may charge a defendant with "theft" and, in most jurisdictions, is not required to indicate the specific form of theft with which the defendant is charged. The defendant will be convicted in the event that the evidence establishes beyond a reasonable doubt either larceny, embezzlement, or false pretenses. A prosecutor under the traditional approach would be required to charge a defendant with the separate offenses of larceny, embezzlement, or false pretenses. The defendant would be acquitted in the event that he or she was charged with deceitfully obtaining possession and title (false pretenses) but the evidence established that the defendant only obtained possession (larceny).[23]

The classic example of how separately defining property offenses impedes prosecution is a case involving an English woman who wrote movie star Clark Gable alleging that he was the father of her child. The letter was based on a misrepresentation of fact because Gable had not been in England at the time that the child was conceived. The writer was charged with the use of the mail to defraud Gable, a form of false pretenses. A federal appeals court reversed her conviction, finding that she intended to intimidate Gable into giving her money based on the unstated threat to publicize her allegations and used the mail to "extort" money rather than to "defraud" Gable.[24]

The Pennsylvania consolidated theft statute, section 3902, provides that conduct considered theft "constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the complaint or indictment."

Consolidated statutes typically grade the severity of larceny, embezzlement, and false pretenses in a uniform fashion based on the value of the property, whether the stolen property is a firearm or motor vehicle, and on factors such as whether the offense took place during the looting of a disaster area.

Model Penal Code

Section 223.1. Consolidation of Theft Offenses

(1) Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under the Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(2) Grading of Theft Offenses:

(a) Theft constitutes a felony of the third degree if the amount involved exceeds $5000, or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.

(b) Theft not within the preceding paragraph constitutes a misdemeanor, except that if the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and the author proves by a preponderance of the evidence that the amount involved was less than $50, the offense constitutes a petty misdemeanor.

(c) The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct . . . may be aggregated in determining the grade of the offense.

(3) It is an affirmative defense to prosecution for theft that the actor:

(a) was unaware that the property or service was that of another;
(b) acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or
(c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.

(4) It is no defense that theft was from the actor's spouse except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

Two new forms of theft that were not anticipated when the consolidated theft statutes were drafted are identity theft and computer crimes.

Identity Theft

William Shakespeare wrote that stealing "my good name" enriches the thief, while making the victim "poor indeed." Today **identity theft**, the theft of your name and identifying information, can lead to economic damage and has been called the crime of the twenty-first century. The stealing of your social security number, bank account information, credit card number, and other identifying data enables thieves to borrow money and make expensive purchases in your name. The end result is the ruining of your credit and creation of financial hardship, forcing you to spend months restoring your "good name." The Department of Justice points to a case in which a thief accumulated $100,000 in credit card debt, obtained a federal home loan and bought a house and motorcycle, and filed for bankruptcy in the victim's name.

In the past, thieves threatened to "take and carry away" tangible property. Today, the theft of intangible property, such as a credit card or social security number, may lead to even greater harm because the thief can employ the number to make repeated purchases, to borrow money, or to establish phone service or cable access. You might not even be aware that the information was taken until you apply for credit and are rejected.

Thieves collect data by examining receipts you abandon in the trash, observing the numbers you enter at an ATM, intercepting mail from credit card companies, or enticing you to surrender information to what appears to be a reputable e-mail inquiry. A lost or stolen wallet or burglary of a home or automobile can result in valuable numbers and documents falling into the hands of organized identity theft gangs. Information can also be obtained by breaking into a company database. Individuals falsely portraying themselves as legitimate business executives, for instance, gained access to ChoicePoint in 2005 and stole roughly 145,000 credit files. Shortly thereafter, computer hackers copied the files of 30,000 individuals contained on the database of LexisNexis. The Bank of America reported the disappearance of a computer tape containing the files of more than a million customers.

Even strict protections over your personal information may not be effective. A study by the Federal Trade Commission, the federal agency concerned with consumer protection, determined that roughly fifteen percent of identity thefts are committed by a victim's family members, friends, neighbors, or co-workers. The perpetrators of identity theft often transfer the information to sophisticated gangs of identity thieves in return for drugs, cellular phones, guns, and money.

The Federal Trade Commission reports that 3.2 million Americans are victimized by identity theft each year and find themselves with unwarranted financial obligations or may even be charged with crimes as a result of another person assuming their identity. The commission estimates that an identity theft occurs every ten seconds. The states with the highest rates of identity theft in 2004 were Arizona (142.5 victims per 100,000 people), Nevada (125.7 victims), California (122.1 victims), Texas (117.6 victims), Colorado (95.8 victims), Florida (92.3 victims), New York (92.0 victims), Washington (91.1 victims), Oregon (87.8 victims), and Illinois (87.6 victims).

Consider how easy it is to intercept your mail and to obtain a preapproved credit card. Think about how many times in an average week you are vulnerable to identity theft resulting from sensitive information in a letter, using your credit card, discarding a receipt, or providing someone with your social security number.

In 1998, the U.S. Congress passed the Identity Theft and Assumption Deterrence Act. This legislation created the new offense of identity theft and prohibits the knowing transfer or use without lawful authority of the "means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity" that constitutes a violation of federal law or a felony under state or local law.[25] A "means of identification" includes an individual's name, date of birth, social security number, driver's license number, passport number, bank account or credit card number, fingerprints, voiceprint, or eye image. Note that merely obtaining another individual's personal documents can result in a year or more in prison. Sentences for violation of the Identity Theft Act can be as severe as fifteen years in prison and a significant fine in those instances in which the perpetrator obtains items valued at $1,000 or more over a one-year period. The perpetrators of identity theft typically are also in violation of statutes punishing credit card fraud, mail fraud, or wire fraud.

The Utah statute on identity theft punishes an individual who knowingly or intentionally obtains "personal identifying information of another person" and uses or attempts to use this information "with fraudulent intent, including to obtain, or attempt to obtain credit, goods, services . . . or medical information in the name of another person." Obtaining items valued at more than $1,000 is a felony under the Utah law.[26]

In 2007, in *State v. Green,* a Kansas Court of Appeals ruled that each time a thief uses a stolen credit card constitutes a separate offense. The defendant opened credit accounts at three stores using another individual's identity and subsequently was convicted of three counts of identity theft. The court explained that a thief who steals money harms the victim only once, whether or not he later spends the money, while each use of a stolen credit card is a "blow to the body of credit established by an innocent person." Every use of the innocent's identity "takes something away from that person in this modern age of credit history and instantaneous commercial transportation."[27] In *City of Liberal, Kansas v. Vargas,* a Kansas appellate court was asked to decide whether an undocumented immigrant who used a false identity to obtain employment committed identity theft.

The Statutory Standard

Florida Statutes Section 817.568. Criminal Use of Personal Identification Information

(1) . . .

(2) (a) Any person who willfully and without authorization fraudulently uses, or possesses with intent to fraudulently use, personal identification information concerning an individual without first obtaining that individual's consent, commits the offense of fraudulent use of personal identification information, which is a felony of the third degree. . . .

(b) Any person who willfully and without authorization fraudulently uses personal identification information concerning an individual without first obtaining that individual's consent commits a felony of the second degree, . . . if the pecuniary benefit, the value of services received, the payment sought to be avoided or the amount of the injury or fraud perpetrated is $5,000 or more or if the person fraudulently uses the personal identification information of 10 or more individuals without their consent. Notwithstanding any other provision of law, the court shall sentence any person convicted . . . to a mandatory minimum sentence of 3 years' imprisonment.

(c) Any person who willfully and without authorization fraudulently uses personal identification information concerning an individual without first obtaining that individual's consent commits a felony of the first degree . . . if the pecuniary benefit, the value of the services received, the payment sought to be avoided, or the amount of the injury or fraud perpetrated is $50,000 or more or if the person fraudulently uses

the personal identification information of 20 or more individuals without their consent. Notwithstanding any other provision of the law, the court shall sentence any person convicted of committing the offense described . . . to a mandatory minimum sentence of 5 years' imprisonment. . . . If the pecuniary benefit, the value of the services received, the payment sought to be avoided, or the amount of the injury or fraud perpetrated is $100,000 or more or if the person fraudulently uses the personal identification information of 30 or more individuals without their consent . . . the court shall sentence any person convicted of committing the offense described . . . to a mandatory minimum sentence of 10 years' imprisonment.

Did Vargas commit identity theft?

CITY OF LIBERAL, KANSAS V. VARGAS, *24 P.3D 155 (KAN. APP. 2001), OPINION BY: MARQUARDT, J.*

The City of Liberal (City) appeals the district court's ruling that Juan Vargas did not commit the crime of identity theft. We affirm.

Facts

In February 2000, Officer Rogers was on duty and noticed a car being driven without a tag light. Officer Rogers stopped the vehicle and asked the driver for his driver's license and proof of insurance. The driver produced Missouri and National Beef Packing Company (National Beef) identification cards bearing the name of Guillermo Hernandez. Officer Rogers ran the name through a regional system. The system produced five identical matches in other states.

The driver admitted that his name was Juan Vargas. He later confessed that he was not authorized to work in the United States and that he had bought papers identifying himself as Guillermo Hernandez so that he could obtain employment at National Beef. Vargas pled guilty in municipal court to one count of identity theft, one count of no seat belt, one count of no tag light, and one count of no driver's license. Vargas appealed the municipal court's decision to the district court.

The district court convicted Vargas of one count of no tag light, one count of no seat belt, and one count of no driver's license. Vargas was acquitted on the count of identity theft. The district court held that the City failed to meet its burden to show fraud in the use of the false identity card. The City appeals. . . .

Issue

The City asks this court to determine whether Vargas's use of a false identification to secure employment and receive the economic benefit of a salary is tantamount to defrauding another person.

Reasoning

"Identity theft is knowingly and with intent to defraud for economic benefit, obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, one or more identification documents or personal identification number of another person other than that issued lawfully for the use of the possessor." K.S.A. 2000 Supp. 21–4018(a).

"'Intent to defraud' means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property." K.S.A. 21–3110(9).

It is a fundamental rule of statutory construction that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. Without state or federal cases to guide our inquiry, we turn to the legislative history of K.S.A. 2000 Supp. 21–4018.

The crime of identity theft was created by the 1998 Kansas Legislature. Representative Bonnie Sharp, a proponent of the legislation, believed it was necessary to criminalize identity theft. She cited the example of a person's social security number being used by another to obtain an illegal checking account and/or a credit card. Representative Sharp stated that the citizens of Kansas should be protected from "this potentially devastating crime." . . .

Kyle Smith, an assistant attorney general for the Kansas Bureau of Investigation, testified on behalf of the bill. Smith was concerned that the "surreptitious acquisition of information done with the intent to defraud" was not illegal at the time the bill was proposed. Smith cited the examples of a motel clerk selling a credit card number or a "trasher" obtaining a social security number, which would allow an individual to access other information, leading to theft. . . .

The committee also heard testimony from Dave Schroeder, a special agent from the Kansas Bureau of Investigation. Agent Schroeder defined identity theft as "acquiring someone's personal identifying information in an effort to impersonate them or commit various criminal acts in that person's name." Agent Schroeder went

on to state that individuals who are armed with a stolen identity can commit numerous forms of fraud. Agent Schroeder was specifically concerned about the theft of personal information such as social security numbers, birth certificates, passports, driver's licenses, dates of birth, addresses, telephone numbers, family history information, credit or bank card numbers, and personal identification numbers.

K.S.A. 2000 Supp. 21–4018 requires that a defendant obtain, possess, transfer, use, or attempt to obtain the identification documents or personal identification numbers of another. This would occur, for example, when a defendant "took" another person's social security number and used that number when applying for a credit card or bank account.

In the case currently before the court, Vargas admitted that he bought the identification. The record on appeal reflects that Vargas obtained a Missouri identification card as well as a social security card. However, there is no evidence that Guillermo Hernandez is a real person who had his identity "stolen."

It appears from the committee minutes that the legislature passed K.S.A. 2000 Supp. 21–4018 in order to protect individuals who have their identity stolen. The testimony is replete with references to individuals who have been defrauded by perpetrators who misappropriate personal information such as a social security or bank account number. There was no mention of any intent by the legislature to protect a third party from identity theft. We do not believe that the legislature intended to criminalize the act of which Vargas is now accused. Vargas lied to his employer and obtained employment through false means. There are other appropriate remedies for a situation such as this. Vargas was terminated from his employment. There may also be federal immigration laws which apply. However, we do not believe that K.S.A. 2000 Supp. 21–4018 is applicable to the situation currently before the court.

However, even if K.S.A. 2000 Supp. 21–4018 did apply to the facts of this case, we do not believe that Vargas could be found guilty. The statute requires an "intent to defraud." Vargas admitted that he intended to use a false identity only to work at National Beef. There is no evidence in the record on appeal that Vargas intended to defraud National Beef by stealing money or by being compensated for services not actually rendered.

In addition, we fail to see how Vargas received the economic benefit mentioned in K.S.A. 2000 Supp. 21–4018. Vargas was paid for the time he worked. Vargas's work product was rated as satisfactory. In fact, the record on appeal indicates that National Beef would rehire Vargas in the future.

The City's main argument is that National Beef relied upon Vargas's statement that he was Guillermo Hernandez when it hired him. Essentially, the City claims that National Beef would not have hired Vargas had it known of his status as an illegal alien. This fact is not borne out in the record on appeal. The personnel director for National Beef testified that he had a "responsibility" to refrain from hiring undocumented workers. However, there is nothing in the record on appeal that would indicate that National Beef was in any way defrauded by Vargas's actions.

Holding

Vargas did not steal Guillermo Hernandez's identity in order to commit a theft. He bought identification under a false name so that he could work in this state. There is no evidence that Vargas intentionally defrauded anyone in order to receive a monetary benefit. In addition, Vargas was appropriately paid for services rendered. The district court correctly interpreted K.S.A. 2000 Supp. 21–4018 when it reversed Vargas's conviction of identity theft.

Questions for Discussion

1. Explain the basis of the Kansas appellate court's reversal of Vargas's criminal conviction for identity theft.
2. Construct an argument that affirms Vargas's conviction using the language of the Kansas identity theft statute.
3. Would this case have been decided differently had Vargas been using a social security number assigned to another individual?
4. Did the need for low-wage labor in the beef-packing industry play a role in the appellate court's decision?

See more cases on the study site: State v. Ramirez, *www.sagepub.com/lippmanccl2e*

You Decide

13.4 Alfredo Ramirez was an illegal resident of the United States and did not possess a social security number. In September 1997, he obtained a job at Trek Bicycle in Walworth County, Wisconsin. In June 1999, the firm discovered that Ramirez's social security number belonged to Benjamin Wulfenstein of Elko, Nevada. Ramirez admitted that he used Wulfenstein's social security number without permission to obtain employment and to continue to be paid over the course of almost two years of work. Ramirez was terminated on July 6, 1999. The Wisconsin statute makes it a crime to

intentionally use the personal identifying information or document of another for purposes of obtaining "credit, money, goods, services or anything else of value" without the consent of the other person and by representing that the actor is the other person or is acting with the consent or authorization of such person. Did Ramirez obtain "anything of value"? How would you respond to Ramirez's argument that this is an *ex post facto* prosecution based on the fact that the Wisconsin statute did not take effect until April 27, 1999? See *State v. Ramirez*, 644 N.W.2d 656 (Wis. App. 2001).

You can find the answer at www.sagepub.com/lippmanccl2e

Computer Crime

Computer crime poses a challenge for criminal law. Larceny historically has protected tangible (material) property. Courts have experienced difficulty applying the traditional law of larceny to individuals who gain access to intangible property without authorization (nonmaterial property that you cannot hold in your hands). The primary property offenses committed in cyberspace include unauthorized computer access to programs and databases and unlawfully obtaining personal information through deceit and trickery. Can you take and carry away access to a computer program?

In *Lund v. Commonwealth,* the defendant, a graduate student in statistics at Virginia Polytechnic Institute, was charged with the larceny and the fraudulent use of "computer operation and services" valued at $100 or more. The customary procedure at the university was for departments to receive computer dollar credits. These dollar credits were deducted from the departmental account as faculty and students made use of the university's central computer. This was a bookkeeping procedure, and no funds actually changed hands. Lund's adviser failed to arrange for his use of the university computer, and Lund proceeded to gain access to the university computer without authorization and spent as much as $26,384.16 in unauthorized computer time. The Virginia Supreme Court ruled that computer time and services could not be the subject of either false pretenses or larceny "because neither time nor services may be taken and carried away. . . . It [the Virginia statute] refers to a taking and carrying away of a certain concrete article of personal property."[28]

State legislatures and the federal government responded to *Lund* by passing statutes addressing computer theft and crime. These statutes punish various types of activity including unauthorized access to a computer or to a computer network or program; the modification, removal, or disabling of computer data, programs, or software; causing a computer to malfunction; copying computer data, programs, or software without authorization; and falsifying e-mail transmissions in connection with the sending of unsolicited bulk e-mail. The question remains whether law enforcement possesses the expertise and resources to track sophisticated cybercriminals.

In *State v. Schwartz,* an Oregon appellate court applies the state's computer crime statute to a defendant who is charged with the theft of passwords from a computer. In reading this case, ask yourself the difference between stealing tangible property and stealing passwords. It is a sign of our technological world that a thief can often cause greater harm by stealing your personal data than by breaking into your house.

The Statutory Standard

Pennsylvania Consolidated Statutes Section 3933. Unlawful Use of Computer

(a) A person commits the offense of unlawful use of a computer if he, whether in person, electronically or through the intentional distribution of a computer virus:

(1) accesses, exceeds authorization to access, alters, damages or destroys any computer, computer system, computer network, computer software, computer program or data base or any part thereof, with the intent: to interrupt the normal functioning of an organization or to devise or execute any scheme or artifice to defraud or deceive or control property or services by means of false or fraudulent pretenses, representations or promises;

(2) intentionally and without authorization accesses, alters, interferes with the operation of, damages or destroys any computer, computer data base or any part thereof;

(3) intentionally or knowingly and without authorization gives or publishes a password, identifying code, identification number or other confidential information about a computer, computer system, computer network or data base.
(4) intentionally or knowingly engages in a scheme or artifice, including, but not limited to, a denial of service, attack upon any computer, computer system, computer network, computer software, computer program, computer server or data base or any part thereof.

(b) Grading. An offense under subsection (a)(1) is a felony of the third degree. An offense under subsection (a)(2),(3) or (4) is a misdemeanor of the first degree.

(c) . . .

(d) Restitution. Upon conviction . . . for the intentional distribution of a computer virus, the sentence shall include an order for the defendant to reimburse the victim for:
(1) the cost or repairing or . . . replacing the affected computer, computer network . . . software . . . program or data base.
(2) lost profit. . . .
(3) the cost of replacing or restoring the data lost or damaged. . . .

Was the defendant guilty of theft when he gained unauthorized access to passwords?

State v. Schwartz, *21 P.3D 1128 (ORE. APP. 1999), Opinion by: Deits, J.*

Facts

Defendant worked as an independent contractor for Intel Corporation beginning in the late 1980s. Defendant's tasks included programming, system maintenance, installing new systems and software, and resolving problems for computer users. In late 1991 or early 1992, defendant began working in Intel's Supercomputer Systems Division (SSD). SSD creates large computer systems that can cost millions of dollars and are used for applications such as nuclear weapons safety. Intel considers the information stored on its SSD computers to be secret and valuable. Each person using SSD computers must use a unique password in order to gain access to electronic information stored there. Passwords are stored in computer files in an encrypted or coded fashion.

In the spring of 1992, defendant and Poelitz, an Intel systems administrator, had a disagreement about how defendant had handled a problem with SSD's e-mail system. The problem was ultimately resolved in an alternative manner suggested by Poelitz, which upset defendant and made him believe that any future decisions he made would be overridden. Accordingly, defendant decided to terminate his SSD contract with Intel. As defendant himself put it, he "hadn't left SSD on the best of terms." At that time, his personal passwords onto all but one SSD computer were disabled so that defendant would no longer have access to SSD computers. His password onto one SSD computer, Brillig, was inadvertently not disabled.

After defendant stopped working with SSD, he continued to work as an independent contractor with a different division of Intel. In March 1993, Brandewie, an Intel network programmer and systems administrator, noticed that defendant was running a "gate" program on an Intel computer called Mink, which allowed access to Mink from computers outside of Intel. "Gate" programs like the one defendant was running violate Intel security policy, because they breach the "firewall" that Intel has established to prevent access to Intel computers by anyone outside the company. Defendant was using the gate program to access his e-mail account with his publisher and to get access to his Intel e-mail when he was on the road. When Brandewie talked to defendant about his gate program, defendant acknowledged that he knew that allowing external access to Intel computers violated company policy. Even though defendant believed that precautions he had taken made his gate program secure, he agreed to alter his program.

In July 1993, Brandewie noticed that defendant was running another gate program on Mink. This program was similar to the earlier gate program and had the same effect of allowing external access to Intel computers. Defendant protested that changes he had made to the program made it secure, but Brandewie insisted that the program violated company policy. At that point, defendant decided that Mink was useless to him without a gate program, so he asked that his account on that computer be closed. Defendant then moved his gate program onto an Intel computer called Hermeis. Because that computer was too slow for him, defendant finally moved his gate program onto the SSD computer Brillig.

In the fall of 1993, defendant downloaded from the Internet a program called "Crack," which is a sophisticated password guessing program. Defendant began to run the Crack program on password files on various Intel computers. When defendant ran the Crack program on Brillig, he learned the password for "Ron B.," one of Brillig's authorized users. Although he knew he did not have the authority to do so, defendant then used Ron B.'s password to log onto Brillig. From Brillig, he copied the entire SSD password file onto another Intel computer, Wyeth. Once the SSD password file was on Wyeth, defendant ran the Crack program on that file and learned the passwords of more than 35 SSD users, including that of the general manager of SSD. Apparently, defendant believed that if he could show that SSD's security had gone downhill since he had left, he could reestablish the respect he had lost when he left SSD. Once he had cracked the SSD passwords, however, defendant realized that although he had obtained information that would be useful to SSD, he had done so surreptitiously and had "stepped out of my bounds." Instead of reporting what he had found to anyone at SSD, defendant did nothing and simply stored the information while he went to teach a class in California.

After he returned from California, defendant decided to run the Crack program again on the SSD password file, this time using a new, faster computer called "Snoopy." Defendant thought that by running the Crack program on the SSD password file using Snoopy, he would have "the most interesting figures" to report to SSD security personnel. On October 28, 1993, Mark Morrissey, an Intel systems administrator, noticed that defendant was running the Crack program on Snoopy. At that point, Morrissey contacted Richard Cower, an Intel network security specialist, for advice about how to proceed. In investigating defendant's actions, Morrissey realized that defendant had been running a gate program on the SSD computer Brillig, even though defendant's access should have been canceled. On October 29, 1993, Cower, Morrissey, and others at Intel decided to contact police.

Defendant was charged with three counts of computer crime, ORS 164.377, and was convicted of all three counts by a jury.

ORS 164.377 includes three separately defined crimes:

> (2) Any person commits computer crime who knowingly accesses, attempts to access or uses, or attempts to use, any computer, computer system, computer network or any part thereof for the purpose of:
>
> (a) Devising or executing any scheme or artifice to defraud;
> (b) Obtaining money, property or services by means of false or fraudulent pretenses, representations or promises; or
> (c) Committing theft, including, but not limited to, theft of proprietary information.
>
> (3) Any person who knowingly and without authorization alters, damages or destroys any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime.
>
> (4) Any person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime.

Issue

Defendant argues, the State concedes, and we agree that the indictment alleged, and the State attempted to prove at trial, only that defendant violated ORS 164.377(2)(c). The parties do not dispute that the State proved that defendant "knowingly accessed . . . used . . . any computer, computer system, computer network or any part thereof" as required by ORS 164.377(2)(c). The parties dispute only whether the evidence was sufficient to establish that defendant did so "for the purpose of . . . committing theft, including, but not limited to, theft of proprietary information." . . .

ORS 164.377 does not define "theft." However, the legislature has defined "theft" in a related statute, ORS 164.015. ORS 164.015 provides, in part, that a person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person: "Takes, appropriates, obtains or withholds such property from an owner thereof." "Property" entails "any . . . thing of value." The parties do not dispute that the password file and individual passwords have value, and there is evidence in the record to support that proposition. The parties dispute, however, whether defendant "took, appropriated, obtained or withheld" the password file and individual passwords.

Defendant argues that he could not have "taken, appropriated, obtained or withheld" the password file and individual passwords because, even though he moved them to another computer and took them in the sense that he now had them on his computer, the file and passwords remained on Intel's computers after he ran the Crack program. The individual users whose passwords defendant had obtained could still use their passwords just as they had before. Intel continued to "have" everything it did before defendant ran the Crack program, and consequently, defendant reasons, he cannot be said to have "taken" anything away from Intel.

The State responds that by copying the passwords, defendant stripped them of their value. The State contends that like proprietary manufacturing formulas, passwords have value only so long as no one else knows what they are. Once defendant had copied them, the passwords were useless for their only purpose, protecting access to

information in the SSD computers. The loss of exclusive possession of the passwords, according to the State, is sufficient to constitute theft.

Reasoning

Under ORS 164.015, theft occurs, among other ways, when a person "takes" the property of another. "Take" is a broad term with an extensive dictionary entry. Some of the dictionary definitions undermine defendant's argument. The first definition of "take" is "to get into one's hands or into one's possession, power, or control by force or stratagem. . . ." Another definition provides "to adopt or lay hold of for oneself or as one's own. . . ." Still another source defines "take" to include "to obtain possession or control. . . ." These definitions indicate that the term "take" might include more than just the transfer of exclusive possession that defendant proposes. For example, "take" could include obtaining control of property, as defendant did with respect to the passwords and password file by copying them.

Turning back to the text of the statute under which defendant was charged, we note that the legislature contemplated that "theft" as used in ORS 164.377(2)(c) could be exercised upon, among other things, "proprietary information." "Proprietary information" includes "scientific, technical or commercial information . . . that is known only to limited individuals within an organization. . . ." Proprietary information, like the passwords and password files at issue here, is not susceptible to exclusive possession; it is information that by definition, can be known by more than one person. Nevertheless, the legislature indicated that it could be subject to "theft."

Holding

We conclude that the State presented sufficient evidence to prove that by copying the passwords and password file, defendant took property of another, namely, Intel, and that his actions, therefore, were for the purpose of theft. The trial court did not err in denying defendant's motion for judgment of acquittal on counts two and three.

Questions for Discussion

1. Explain in clear and understandable fashion the basic facts that form the basis of the charge brought against Schwartz.
2. Why does the defendant contend that he is not guilty? How does Oregon respond to this argument? What is the ruling of the court?
3. Do you agree with the court that a password may be the subject of theft? What is the difference between the theft of a watch and the theft of a password? Why was a special statute required to prosecute the defendant for stealing passwords?
4. At what point did the defendant commit a computer crime? Was it when he looked at a password without authorization or when he transferred the passwords to his own computer? Do passwords retain their value indefinitely?

Crime in the News

In November 2008, a federal jury convicted Lori Drew in what experts characterized as the first successful prosecution for "cyberbullying" in the United States. Drew, forty-nine, had created a MySpace account in 2007 under the name of Josh Evans, a fictitious sixteen-year-old male. "Josh" started corresponding with thirteen-year-old Megan Meir. "Josh" told Megan that he recently had moved into a nearby town and that he was homeschooled and that his family did not yet have a telephone. What was Lori's motivation? Witnesses testified that Lori was angry that Megan allegedly had circulated rumors about Lori's daughter Sarah. Lori's plan was get Megan to correspond with "Josh" about Sarah in order to document and to publicize Megan's pattern of malicious gossip. At some point, Lori abandoned her initial plan and shifted her attention to humiliating and hurting Megan. Lori should have anticipated that this plan might prove dangerous because Lori knew that Megan suffered from depression and from attention deficit disorder and harbored thoughts of suicide.

"Josh" corresponded with Megan for several weeks, but the tone of the e-mails changed, and "Josh" began sending nasty messages. For example, in October 2008, "Josh" wrote in an instant message that "the world would be a much better place without you." Megan responded that "you're the kind of boy that a girl would kill herself over," and shortly thereafter, on October 16, 2008, she hanged herself to death in her bedroom.

Several months later, it was disclosed that "Josh," in fact, was Lori Drew, Megan's next-door neighbor.

Missouri officials were overwhelmed with calls for Lori's criminal prosecution but explained that there was no state criminal statute that prohibited Lori's conduct. Federal authorities also lacked a clear statutory basis for bringing Lori to trial. The U.S. prosecutor in Los Angeles, California, took the unprecedented step of prosecuting Lori under the Computer Fraud and Abuse Act of 1986, which in the past had been used to prosecute "hackers" of secure computer sites. The prosecutor alleged at Lori's trial that Lori intended to "humiliate" and to "hurt" Megan and had "hatched a plan in order to prey on the psyche of a vulnerable thirteen-year-old." The jury, after hearing the evidence, convicted Lori of three counts of computer fraud for misrepresenting herself as a teenage boy in violation of the MySpace user agreement to submit "truthful and accurate" registration information. Lori's registration as "Josh" had resulted in her "unauthorized access" to a MySpace account. The decision to bring charges in Los Angeles rather than in Missouri is explained by the fact that MySpace servers and corporate headquarters are located in Los Angeles. Critics of the prosecution and conviction criticized the government's unprecedented reliance on the statute to convict Lori Drew, in effect, for a failure to adhere to the user agreement established by a private firm. Missouri and several other states have now passed "cyberharassment" laws and have launched prosecutions. Whether these laws violate individuals' First Amendment freedom of speech is yet to be determined. What if "Josh" were a real teenager who had engaged in the same behavior as Lori? Could the government prosecute Josh under the Computer Fraud and Abuse Act? Should cyberbullying be a crime?

In July 2009, federal judge George H. Wu threw out Lori's conviction and explained that Lori could not have anticipated that she might be prosecuted under the federal computer fraud act.

Receiving Stolen Property

There was no offense of **receiving stolen property** under the common law. An English court, in 1602, condemned a defendant who knowingly purchased a stolen pig and cow as an "arrant knave" and complained that there was "no separate crime of receiving stolen property."[29] In the late seventeenth century, the English Parliament passed a law providing that an individual who knowingly bought or received stolen property was liable as an accessory after the fact to theft. In 1827, Parliament passed an additional statute declaring that receiving stolen property was a criminal offense. This law was later incorporated into the criminal codes of American states and, today, is punished as a misdemeanor or felony, depending on the value of the property.

The offense of receiving stolen property requires that an individual

- receive property,
- knowing the property to be stolen,
- with the intent to permanently deprive the owner of the property.

Why do we punish receiving stolen property as a separate offense? Thieves typically sell stolen property to "fences," individuals who earn a living by buying and then selling stolen property. The offense of receiving stolen property is intended to deter "fencing." Generally, an individual may not be charged with both stealing and receiving stolen property.

Actus Reus

The *actus reus* of receiving stolen property requires that an individual control the stolen property, however briefly. An individual receiving the stolen items may take either actual possession of the property or constructive possession of the property by arranging for the property to be delivered to a specific location or to another individual.

Receiving stolen property traditionally was limited to goods that were taken and carried away in an act of larceny. The trend is to follow the approach of the Model Penal Code and to punish the receipt of stolen property, whether taken through larceny, embezzlement, false pretenses, or another illegal method.

Most state statutes on receiving stolen property cover both personal and real property. The Model Penal Code limits the statute to personal property on the grounds that this property is disposed of through fences and that this is not the case with real estate.

The property must actually be stolen. A defendant was acquitted of receiving stolen property in a case in which thieves were arrested in the course of breaking and entering into a railroad car and then cooperated with the police in arranging to "sell" the tires to a fence. The Sixth Circuit

Federal Court of Appeals ruled that the defendant was not guilty, because the defendant had not purchased "stolen property."[30]

Mens Rea

For an international perspective on this topic, visit the study site.

State statutes typically require the *mens rea* of actual knowledge that the goods are stolen. Other statutes broaden this standard by providing that it is sufficient for an individual to believe that the goods are stolen. A court would likely conclude that a jeweler believed that a valuable watch was stolen that he or she inexpensively purchased from a known dealer in stolen merchandise. A third group of statutes applies a recklessness or negligence standard to the owners of junkyards, pawnshops, and other businesses where they neglect to investigate the circumstances under which the seller obtained the property. Consider the case of the owner of an art gallery specializing in global art who regularly buys rare and valuable Asian and African artwork that is thousands of years old and who, in one instance, buys a piece for next to nothing from individuals who wander into the shop. These statutes would hold the buyer guilty of receiving stolen property for failing to investigate how the seller obtained the property.

How can we determine whether an individual knows or honestly believes that property is stolen? Courts generally hold that it is sufficient if a reasonable person would have possessed this awareness. In most cases, this is inferred from the price, the seller, whether the type of property is frequently the subject of theft, the circumstances of the sale, and whether the recipient purchased stolen merchandise from the same individual in the past.

The recipient of stolen property must also have the *mens rea* to permanently deprive the owner of possession. A defendant does not possess the required intent who believes that he or she is the actual owner of the property, because there is no intent to deprive another of possession. The required intent is also lacking where the recipient intends to return the property to the rightful owner.

The required intent to permanently deprive an individual of possession must concur with the receipt of the property. The Model Penal Code, however, provides that the required intent may arise when an individual receives and only later decides to deprive the owner of possession.

Hurston v. State, the next case in the textbook, challenges you to determine whether the defendant satisfied the intent standard for receiving possession of stolen property. This is followed by *People v. Land,* which asks whether the defendant had possession of the stolen automobile.

The Statutory Standard

Florida Statutes Section 812.019

(1) Any person who traffics in, or endeavors to traffic in, property that he or she knows or should know was stolen shall be guilty of a felony of the second degree [punishable by up to fifteen years in prison].

(2) Any person who initiates, organizes, plans, finances, directs, manages, or supervises the theft of property and traffics in such stolen property shall be guilty of a felony of the first degree [punishable by up to thirty years in prison].

Model Penal Code

Section 223.6. Receiving Stolen Property

(1) A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner. "Receiving" means acquiring possession, control or title, or lending on the security of the property.

(2) The requisite knowledge or belief is presumed in the case of a dealer who:

(a) is found in possession or control of property stolen from two or more persons on separate occasions;

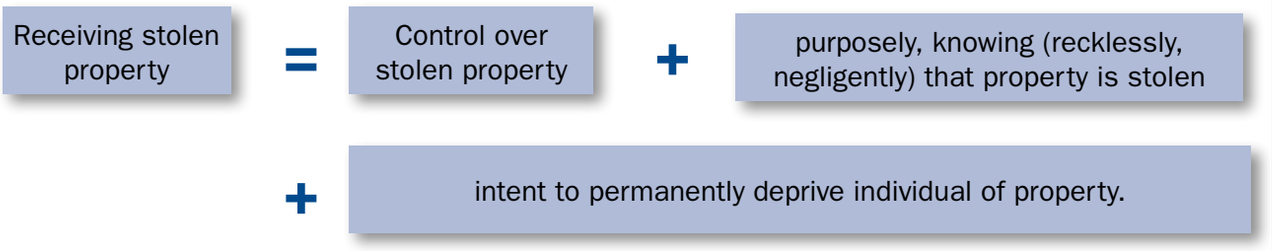
(b) has received stolen property in another transaction within the year preceding the transaction charged; or
(c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.

"Dealer" means a person in the business of buying or selling goods, including a pawnbroker.

Analysis

- Receiving stolen property is limited to property that can be moved and does not include real estate.
- There is no requirement that the purchaser know that the property is in fact stolen; it is sufficient that an individual believe that the property probably has been stolen.
- A defendant must know or believe that the property probably has been stolen. The intent to restore the property to the owner is a defense.
- The required intent may arise after the property is in the possession of the defendant.
- Knowledge is assumed under certain circumstances, including the fact that an individual is a "dealer."
- The receiver is liable regardless of the method employed by the thief, whether larceny, embezzlement, false pretenses, or other form of theft.

The Legal Equation



Was Hurston guilty of receiving stolen property?

Hurston v. State, *414 S.E.2D 303 (GA. APP. 1991), Opinion by: Andrews, J.*

Illya Hurston was tried jointly with Demetrious Reese and convicted of theft by receiving stolen property. Hurston appeals from the denial of his motion for new trial.

Issue

The issue to be decided is whether there was sufficient evidence for a jury to find Hurston guilty of receiving stolen property.

Facts

A silver 1986 Pontiac Fiero belonging to Stella Burns was stolen from a parking lot at Underground Atlanta on June 11, 1989, between 10:35 and 11:05 P.M. Two Rockdale County sheriff's deputies observed a silver Fiero at a convenience store later that night at approximately 1:20 A.M. Hurston's co-defendant, Reese, was driving the car, and appellant was slumped in the passenger seat. The deputies became suspicious because of the late hour, the cautious manner in which Reese was walking after exiting the car, and the fact that Hurston appeared to be hiding and decided to follow the Fiero. When Reese drove away from the store with the deputies following in their marked car, he crossed the centerline of the highway.

The deputies, who by this time had ascertained from computer records that the car was stolen, turned on the

blue lights and siren of their automobile. Reese refused to stop, drove away from the deputies at a speed in excess of 100 miles per hour, and attempted at one point to run the police vehicle into a wall. The deputies pursued the Fiero until Reese lost control and wrecked in a field. Reese ran from the scene and was pursued and apprehended by one deputy. Another officer apprehended Hurston, who had gotten out of the car immediately after the accident and appeared to be ready to run.

At trial, Hurston testified that he spent the day at his former girlfriend's home watching television with her and a friend of hers. Later in the day, the friend called her boyfriend, Reese, whom Hurston testified he had never met, to join them. Hurston testified Reese came to the house and stayed for awhile, left for several hours, and then returned and invited Hurston to ride in the Fiero with him to a relative's home. Hurston recalled that he was suspicious about the ownership of the vehicle because Reese, a teenager, seemed too young to own such a nice car but that in response to his inquiry, Reese stated that the car belonged to his cousin. Hurston testified that after they left the convenience store and Reese saw the deputies in pursuit, he began to speed and admitted to Hurston for the first time that the car was stolen. Hurston's trial testimony differed somewhat from an earlier statement he gave regarding the evening's events.

Burns, the vehicle's owner, testified that the vehicle was driven without keys and that the steering wheel had been damaged, which was consistent with it having been stolen. She testified that various papers, including the car registration and business cards bearing the owner's name and address, had been removed from the glove compartment and were on the floor of the car; that grass, mud, food, drink, and cigarettes were scattered in the car; and that a picture of her daughter was displayed on a visor. Hurston denied noticing the personal items or the damaged steering wheel.

Reasoning

OCGA section 1687 provides that "a person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner. Receiving means acquiring possession or control."

Unexplained possession of recently stolen property, alone, is not sufficient to support a conviction for receiving stolen property, but guilt may be inferred from possession in conjunction with other evidence of knowledge. Guilty knowledge may be inferred from circumstances which would excite suspicion in the mind of an ordinary prudent man. "Possession as we know it, is the right to exercise power over a corporeal thing. . . ." Furthermore, "[i]f there is any evidence of guilt, it is for the jury to decide whether that evidence, circumstantial though it may be, is sufficient to warrant a conviction."

First, there was sufficient evidence for a jury to find that Hurston knew, or should have known, that the vehicle was stolen. At trial, Hurston admitted that he doubted that the vehicle belonged to Reese. There was evidence from which the jury could reasonably have concluded that Hurston was aware during the two hours that he spent in the small vehicle that it was stolen, in that the vehicle was being driven without keys, the steering wheel was damaged, and the interior was disorderly, which was inconsistent both with Reese's ownership of the vehicle and with his explanation that he borrowed it from a relative. Hurston's suspicious behavior at the convenience store and his attempt to flee also indicated that he knew the vehicle was stolen.

There was also evidence from which the jury could conclude that Hurston possessed, controlled, or retained the vehicle. Although Hurston was only a passenger in the vehicle, the inquiry does not end here, for in some circumstances, a passenger may possess, control, or retain a vehicle for purposes of OCGA section 1687. Here, there was sufficient evidence that Hurston exerted the requisite control over the vehicle in that Reese left Hurston alone in the car with the vehicle running when he went into the convenience store.

Dissenting, *Sognier, C.J.*

I respectfully dissent, for I find the evidence was insufficient to establish the essential element of "receiving" beyond a reasonable doubt. A person commits the offense of theft by receiving stolen property when he "receives, disposes of, or retains stolen property which he knows or should know was stolen. . . . 'Receiving' means acquiring possession or control . . . of the property." OCGA section 1687(a). Here, the record is devoid of evidence that appellant exercised or intended to exercise any dominion or control over the car or that he ever acquired possession of it. The "mere presence" of a defendant in the vicinity of stolen goods "furnishes only a bare suspicion" of guilt and thus is insufficient to establish possession of stolen property. Evidence that a defendant was present as a passenger in a stolen automobile, without more, is insufficient to establish possession or control. I disagree with the majority that the circumstantial evidence that appellant, the automobile passenger, was observed to be "slumped" in the seat while Reese parked the car and entered a store was sufficient to constitute the type of "other incriminating circumstances" that would authorize a rejection of the general principle that "the driver of the [stolen] automobile [is] held prima facie in exclusive possession thereof."

The only evidence offered by the State to connect appellant to the stolen car was that he was a passenger in the car several hours after it was stolen.

Questions for Discussion

1. What facts does the court rely on to establish that Hurston knew or should have known that the automobile was stolen? Do these facts establish a criminal intent beyond a reasonable doubt?
2. What facts does the court rely on in finding that Hurston possessed or controlled the automobile? On what basis does the dissent dispute the court's determination?
3. What single fact is crucial in the court's finding of guilt? Are there additional facts that are not in the court's opinion that you would find helpful in determining if Hurston is guilty or innocent?
4. As a judge, how would you rule in this case?

Did Land possess the stolen vehicle?

PEOPLE V. LAND, *35 CAL. RPTR. 2D 544 (CAL. APP. 1994), OPINION BY: JOHNSON, J.*

Appellant, Jerry Land, was convicted by a jury of numerous criminal offenses committed during a one-night crime spree. He appeals his conviction, contending . . . insufficient evidence supports the conviction for receiving stolen property. . . . We affirm the judgment on this issue.

Facts

The evening's events began with him and his friend drinking in his backyard. At some point, appellant's friend left and returned with a white car. His friend suggested going to the San Fernando Valley (Valley) to visit a girlfriend. Once in the car, appellant's friend told him the car was stolen. When they reached the Valley, his friend said he wanted to rob somebody. According to appellant's statement, his friend then stole some food from a 7-Eleven store.

After the theft at the 7-Eleven, they resumed driving the white car. They saw a red vehicle, and his friend told appellant, "We're going to rob that Hispanic and take his car." They made a U-turn and intentionally bumped into Gabriel Sandoval's car. They took Sandoval's wallet at rifle point and made him crawl into the white car. Sandoval was shot in the back and in the leg and left for dead in the stolen white car. Appellant and his friend then took off in Sandoval's car.

Appellant was charged with the unlawful taking or driving of the white car and with receiving the same stolen property. The jury found appellant not guilty of the theft of the car but convicted him of receiving that stolen property.

Issue

Appellant contends the conviction must be reversed because there was no evidence he possessed or exerted dominion and control over the vehicle. He claims the evidence showed he was merely a passenger in the stolen vehicle.

At the time of trial, Penal Code section 496, subdivision (a) provided in pertinent part: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained . . . is punishable by imprisonment in a state prison. . . ."

Thus, to sustain a conviction for receiving stolen property, the prosecution must prove (1) the property was stolen, (2) the defendant knew the property was stolen, and (3) the defendant had possession of the stolen property. Possession of the stolen property may be actual or constructive and need not be exclusive. Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion over the stolen property.

Appellant's own statement established the car was stolen and he knew the car was stolen. It is the third prong which appellant claims lacks evidentiary support. . . . The People counter the evidence demonstrated more than mere access or proximity to the stolen property. The People's argument suggests appellant's physical presence in the stolen vehicle, or the suspicious circumstances surrounding the car's acquisition, is sufficient to demonstrate he co-possessed the car with the driver. . . .

Reasoning

Dominion (treatment of the stolen automobile as one's own) and control are essentials of possession, and they cannot be inferred from mere presence or access. Something more must be shown to support inferring of these elements. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight. It is clear, however, that some additional fact is essential.

Decisions of other jurisdictions which have addressed the issue have . . . concluded strong evidence of the passenger's guilty knowledge and a close relationship to the driver or thief, or evidence of a defendant's conduct

indicating control, may give rise to an inference of possession. This conduct includes the fact that a passenger exerted control over stolen vehicle because he was left in a stolen car with motor running while driver went into convenience store; . . . passenger had tool for prying off spoke wheels and kept lookout when driver got out of car; . . . passenger's presence in stolen vehicle, flight from the police when car stopped, and violent attempt to avoid capture sufficient evidence from which jury could infer constructive possession of the stolen vehicle; . . . evidence defendant passenger in vehicle six hours after its theft, lived close to the place of the theft, and gave police false information sufficient evidence for jury to infer he constructively possessed stolen vehicle; . . . passenger in car for three hours but when arrested found crouched beneath steering wheel and previous driver exited car from passenger side adequate evidence to establish possession; . . . passenger had possession of stolen car where he witnessed theft by his friend, accepted invitation to ride in the car, and got in and out of the car during five-hour ride.

From the foregoing, we learn the fact a person is a passenger in a stolen vehicle will not necessarily preclude a conviction for receiving stolen property. It is also clear from these decisions additional factual circumstances are necessary to establish a passenger has possession or control of the stolen car. However, these decisions indicate there is no single factor or specific combination of factors which unerringly points to possession of the stolen vehicle by a passenger. If anything, these decisions emphasize the question of possession turns on the unique factual circumstances of each case.

The evidence established the driver and appellant were friends. They drank together, did drugs together, and presumably knew each other well. Appellant knew the car was stolen. The car was stolen near appellant's residence, and they drove in it within the hour of its theft. They used the vehicle for their own benefit and enjoyment. The car was instrumental in their joint criminal enterprise that evening. They first used the car to transport them to the Valley to commit the theft at the 7-Eleven store. Then they used the car in the robbery, assault, and attempted murder of Sandoval.

Holding

From the facts of appellant's close relationship to the driver, use of the vehicle for a common criminal mission, and stops along the way before abandoning it (during which appellant apparently made no effort to disassociate himself from his friend or the stolen vehicle), a reasonable juror could infer appellant, as the passenger, was in a position to exert control over the vehicle. This inference, in turn, would support a finding of constructive possession.

Accordingly, we conclude the record contains sufficient additional evidentiary factors suggesting dominion and control from which a reasonable juror could infer appellant had possession of the stolen vehicle sufficient to support the conviction for receiving stolen property.

Questions for Discussion

1. What are the elements of receiving stolen property? What legal test must be demonstrated to satisfy the element of possession?
2. As a defense attorney, why would you argue that this legal test was not satisfied? What facts does the court rely on to support Land's conviction?
3. How would you rule?

You Decide

13.5 Defendant John L. Clough discovered various items missing from his music club. These items included four amplifier speakers, which were used by bands that played at the club. An employee, Gaylord Burton, worked at the club for several months and disappeared at the same time that the speakers were discovered to be missing. An employee reportedly had seen Burton taking the speakers on the morning of November 2, 1989. The equipment later was discovered at a pawnshop. An employee of the pawnshop, Anthony Smith, testified that two men had tried to pawn the speakers. Smith refused to accept the speakers without identification. The two men returned later with Olga Lee Sonnier, who presented a driver's license and pawned the speakers for $225. The four speakers were worth at least $350. Sonnier appealed her conviction for "theft by receiving." There are three elements of this offense. First, a theft by another person. Second, the defendant received the stolen property. Third, the defendant received the stolen property knowing that it was stolen. Was Sonnier in possession of the speakers? Sonnier also claimed that she lacked actual knowledge that the speakers were stolen. The speakers were pawned for a reasonable amount of money, and a reasonable person would have no notion of the monetary value of the speakers. Should the Texas appellate court affirm Sonnier's conviction? See *Sonnier v. State,* 849 S.W.2d 828 (Tex. App. 1992).

You can find the answer at www.sagepub.com/lippmanccl2e

Forgery and Uttering

The law of forgery originated in the punishment of individuals who used or copied the king's seal without authorization. The seal was customarily affixed to documents that bestowed various rights and privileges on individuals, and employing this stamp without authorization was viewed as an attack on royal power and prerogative. The law of forgery was gradually expanded to include private as well as public documents.

Forgery is defined as creating a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others. The crime of forgery is complete upon the drafting of the document regardless of whether it is actually used to defraud others. **Uttering** is a separate and distinct offense that involves the *actus reus* of circulating or using a forged document.

Forgery and uttering are typically limited to documents that possess "legal significance." This means that the document, if genuine, would carry some legal importance, such as conveying property or authorizing an individual to drive. A falsified document is not a forgery when it merely impacts an individual's reputation or professional advancement, such as a fabricated newspaper account of a political candidate's evasion of military service.

The Model Penal Code extends forgery and uttering to all varieties of documents. This would include the attempt several years ago to sell a book that was alleged to be Adolf Hitler's diary that, in truth, was a skillfully produced fraud. Fraudulent documents that may be punished as a forgery under state statutes include checks, currency, passports, driver's licenses, deeds, diplomas, tickets, credit cards, immigration visas, and residency and work permits.

There are several elements to establish forgery; each must be proven beyond a reasonable doubt:

- A false document or material modification of an existing document that is
- written with intent to defraud and,
- if genuine, would have legal significance.

The elements of uttering are:

- Offering a
- forged instrument that is
- known to be false and is
- presented as authentic
- with the intent to defraud or deceive.

Forgery is similar to other property crimes in that the forger is unlawfully obtaining a benefit from another individual. The larger public policy behind criminalizing forgery is to insure that people are able to rely on the authenticity or truth of documents. You want to be confident that when you buy a car, the title you receive is genuine and that the automobile has not been stolen. Combating the forgery of passports and visas has taken on particular importance in securing the borders of the United States against the entry of terrorists.

Actus Reus

The important point to remember is that forgery is falsely making or materially altering an existing document. This may entail creating a false document or materially (fundamentally) changing an existing document without authorization. A material modification is a change or addition that has legal significance.

A forgery may involve manufacturing a "false identification" for a friend who is too young to drink, creating false passports for individuals seeking to illegally enter the United States, or fabricating tickets to a sold-out rock concert. Forgery may also involve materially or fundamentally altering or modifying an existing document. Stealing a check, signing the name of the owner of the account without authorization, and making the check payable to yourself for $100 is forgery. In this example, although the check itself is genuine, the details do not reflect the intent of the owner of the check. On the other hand, merely filling in the date on an undated check would ordinarily not constitute a material alteration because this change typically has no legal significance.

In other words, the question in forgery is whether a document is a "false writing." The document itself may be false, or the material statements in the document may be materially false.

Mens Rea

Forgery requires an intent to defraud; this need not be directed against a specific individual.

Uttering

Uttering is offering a document as genuine that is known to be false with the intent to deceive. This is a different offense from forgery, although the two are often included in a single statute. Merely presenting a forged check to a bank teller for payment knowing that it is inauthentic completes the crime of uttering. The teller need not accept the forged check as genuine.

Simulation

Several states follow the Model Penal Code in providing for the crime of **simulation**. This punishes the creation of false objects with the purpose to defraud, such as antique furniture, paintings, and jewelry. Simulation requires proof of a purpose to defraud or proof that an individual knows that he or she is "facilitating a fraud."

The Statutory Standard

Consider how the South Carolina statute applies and expands the law of forgery.

South Carolina Code 16–13–15

(A) It is unlawful for any person to falsify or alter a transcript, a diploma, or the high school equivalency diploma known as the GED from any high school, college, university, or technical college of this State, from the South Carolina Department of Education, or from any other transcript or diploma issuing entity.

(B) It is also unlawful for any person to use in this State a falsified or altered transcript, diploma or high school equivalency diploma known as the GED from the South Carolina Department of Education, or from any in-state or out-of-state high school, college, university or technical school, or from any other transcript or diploma issuing entity with the intent to defraud or mislead another person.

(C) Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

Model Penal Code

Section 224.1. Forgery

(1) A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

(a) alters any writing of another without his authority; or

(b) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or

(c) utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b).

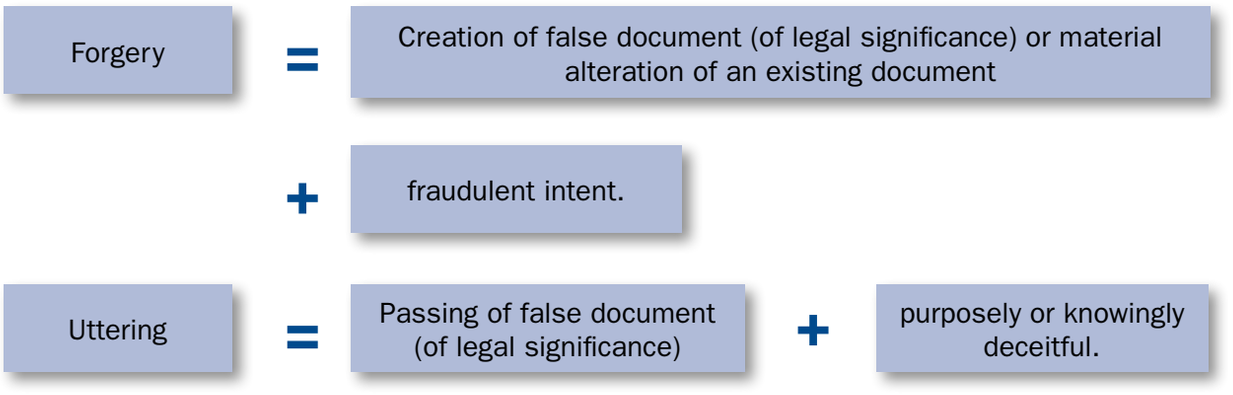
"Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification.

(2) Forgery is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise. Forgery is a felony of the third degree if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations. Otherwise forgery is a misdemeanor.

Analysis

- This section applies to "any writing" and to "any other method of recording information, money, coins, credit cards and trade-marks and other symbols." Forgery is not limited to documents having legal significance. As a result, documents such as medical prescriptions, diplomas, and trademarks are encompassed within this provision. The section is not limited to economic harm and may include circulating a false document that injures an individual's reputation.
- Serious forgeries that have the most widespread and serious impact are second-degree felonies, carrying a maximum penalty of ten years. Other forgeries are punishable as felonies of a third degree, carrying a maximum of five years. Forgeries of documents that do not have legal significance, such as diplomas, are misdemeanors.
- Counterfeiting of currency is included in this section rather than being made a separate offense.
- Section 1(c) punishes uttering.

The Legal Equation



Was the defendant guilty of forgery when he signed his name to the corporate checks?

UNITED STATES v. CUNNINGHAM, *813 N.E.2D 891 (N.Y. 2004), OPINION BY: ROSENBLATT, J.*

Defendant was convicted of forgery in the second degree for signing his own name to a corporate check, in excess of his authority. Because defendant's conduct does not constitute forgery under our statute, we reverse his conviction.

Facts

As the owner of a logging operation, Peter Morat planned to open a sawmill business in Madison County, under the name Herkimer Precut, Inc. He engaged defendant as a

consultant to arrange for financing and related activities. In exchange for his services, defendant was to receive a 20% interest in the new venture. As the project progressed, Morat turned over various financial aspects of the business to defendant, entrusting him with control over the corporate checkbook. Because defendant was responsible for paying bills, Morat would sometimes provide defendant with blank, signed checks. At no time, however, did Morat authorize defendant to sign any checks.

After Morat discovered that corporate bills were not being paid, he examined the company's bank records and found unauthorized payments, some on checks he had signed in blank and others bearing a signature he did not recognize. Morat alleged that by improperly signing or issuing checks, defendant stole thousands of dollars from Herkimer Precut.

The court was found to lack jurisdiction over nineteen of the charges. A single count survived the trial: the forgery conviction before us, stemming from a $195.50 Herkimer Precut check defendant wrote to Nancy Herrick for work performed by Northeast Woodcraft. The defendant signed his own name to that check, telling Herrick that he owned Herkimer Precut. Herrick was acquainted with defendant personally and professionally and knew that he was affiliated with Herkimer Precut. She did not know, however, that Morat owned the company and that defendant lacked authority to sign checks. The check was for defendant's personal expenses.

Reasoning

In *People v. Levitan,* 399 N.E.2d 1199 (N.Y. 1980), Levitan signed her name to deeds purporting to convey real property she did not own. In reversing her forgery conviction, we noted that "no pretense was ever made that the signatory was anyone other than defendant." We also observed that "under our present Penal Law, as under prior statutes and the common law, a distinction must be drawn between an instrument which is falsely made, altered or completed, and an instrument which contains misrepresentations not relevant to the identity of the maker or drawer of the instrument."

Although the Legislature has updated the statute to cover credit cards and certain other technological advances, it has not abrogated *Levitan*'s classic approach to forgery. In defining forgery, Penal Law section 170.00(4) provides, in pertinent part, that "a person falsely makes a written instrument when he makes or draws a complete written instrument . . . which purports to be an authentic creation of its ostensible maker or drawer, but which is not such . . . because the ostensible maker or drawer . . . did not authorize the making or drawing thereof."

Issue

The terms "authentic creation" and "ostensible maker" are pivotal. In most prosecutions, the forger, acting without authority, signs someone else's name. Thus, in a typical case, the forger, John Doe, wrongfully signs Richard Roe's name, (mis)leading the payee into believing that the check is the authentic creation of Richard Roe, its ostensible maker. Roe, of course, has not granted Doe any such authority and, in most such instances, has never even met Doe. In this simple formulation, the ostensible maker (Roe) and the actual maker (Doe) are two different people. If, however, the ostensible maker and the actual maker are one and the same, there can be no forgery under the statute. . . .

The People contend that Herkimer Precut is the ostensible maker because its name appears on the check as owner of the account. Further, they argue that because defendant lacked authority to sign company checks, the check in question was not the authentic creation of the company, and a forgery is made out. Defendant counters that the check was an authentic creation of its ostensible maker and that because he signed his own name, he cannot be guilty of forgery: as the ostensible maker, he did not pretend to be anyone other than himself—the actual maker. Moreover, defendant argues that even if Herkimer Precut was the "ostensible maker" of the check, defendant's relationship with Herkimer Precut was sufficient to make the check the "authentic creation" of the company. We have observed that "when an individual signs a name to an instrument and acknowledges it as his own, that person is the 'ostensible maker.'"

Forgery is a crime because of the need to protect signatures and make negotiable instruments commercially feasible. In its common law roots, forgery had little to do with abstract questions of authority. At Queen's Bench, Chief Justice Cockburn wrote that forgery "by universal acceptation . . . is understood to mean the making or altering of a writing so as to make the writing or alteration purport to be the act of some other person, which it is not." As one treatise explains, "it is not forgery for a person to sign his own name to an instrument, and falsely and fraudulently represent that he has authority to bind another by doing so" and "the signer is guilty of false pretenses only." Although statutes vary, most jurisdictions in this country have tended to follow this approach to forgery.

As Blackstone wrote, "forgery" is "the fraudulent making or alteration of a writing to the prejudice of another man's right."

Holding

We conclude that authority and authenticity are not the same thing. Defendant did not commit forgery merely by exceeding the scope of authority delegated by the corporation. Our interpretation leaves no gap in the Penal Law. Although embezzlers who use their own names to sign checks beyond their authority are not guilty of forgery in New York, their conduct would ordinarily fall within our larceny statutes.

Moreover, a contrary ruling would create vexing problems in adjudging forgery cases. If, for example, a corporate officer authorized to sign corporate checks does so for a personal purchase, is that forgery? Would an officer authorized to sign checks up to $20,000 who signs a check for $25,000 be guilty of forgery? While the prosecution argues that we should read our statute to justify convictions in those instances, it has not identified any New York decision interpreting the statute so expansively.

Questions for Discussion

1. Why does the prosecutor allege that Cunningham is guilty of forgery? What is his defense?
2. Explain the reason that the court does not find that Cunningham was guilty of forgery.
3. How would you rule?
4. Could the defendant be successfully prosecuted under a different criminal charge?
5. Should the law be changed to recognize Cunningham's acts as forgery? What facts would the prosecution have to demonstrate under existing law to convict Cunningham of forgery? What facts could convict him of uttering?
6. Do you agree with the decision in this case?

You Decide

13.6 McGovern owed $1,800 to Scull. McGovern purchased $2,400 in traveler's checks from Citibank for purposes of repaying Scull. The checks may be redeemed for money at most banks or stores when signed by the individual to whom the check is issued. Scull and McGovern entered into a corrupt arrangement designed to reimburse Scull. Scull practiced McGovern's signature and took McGovern's driver's license and the traveler's checks and proceeded to cash the checks at two banks and collected $2,400. McGovern then reported to the police that the checks had been stolen from his car, and in accordance with the highly advertised policy concerning traveler's checks, McGovern was provided with replacement checks in the amount of $2,400 by Citibank. Did Scull's impersonation of McGovern constitute forgery? See *United States v. McGovern*, 661 F.2d 27 (3rd Cir. 1981).

You can find the answer at www.sagepub.com/lippmanccl2e

Robbery

Robbery is typically described as aggravated larceny. You should think of robbery as larceny from an individual with the use of violence or intimidation. Professor Perkins observes that in ancient law, the thief who stole quietly and secretly was viewed as deserving harsher punishment than the robber who openly employed violence. The common law reversed this point of view and categorized robbery as among the most serious of felonies, which should be treated as a separate offense deserving of harsher punishment than larceny.[31]

Robbery is the trespassory taking and carrying away of the personal property of another with intent to steal. Robbery is distinguished from larceny by additional requirements:

- The personal property must be taken from the victim's person or presence.
- The taking of the personal property must be achieved by violence or intimidation.

The California criminal code defines robbery as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." In this chapter, robbery is treated as a property crime, although the FBI categorizes robbery as a violent crime against the person.[32]

Actus Reus

The *property must be taken from the person or presence of the victim.* Property is considered to be on the person of the victim if it is in his or her hands or pockets or is attached to his or her body (an earring) or clothing (a key chain).

The requirement that an object must be taken from the "presence of the victim" is much more difficult to apply. The rule is that the property must be within the proximity and control of the victim. What does this mean? The prosecution is required to demonstrate that had the victim not been subjected to violence or intimidation, he or she could have prevented the taking of the property.

In one frequently cited case, the defendants forced the manager of a drug store to open a safe at gunpoint. The defendants then locked the manager in an adjoining room and removed the money from the safe. An Illinois court found that the money was under the victim's personal control and protection and that he could have prevented the theft had he not been subjected to an armed threat.[33] Professor LaFave illustrates the requirement that property be taken from the presence of the victim by noting that it would not be robbery to immobilize a property owner at one location while a confederate takes the owner's property from a location several miles away, because the owner could not have prevented the theft.[34]

The *property must be taken by violence or intimidation*. The Florida statute provides that robbery involves a taking through "the use of force, violence, assault, or putting in fear."[35] Keep in mind that it is the use of violence or intimidation that distinguishes robbery from larceny. The line between robbery and larceny, however, is not always clear. In general, any degree of force is sufficient for robbery. You are walking down the street loosely carrying your backpack when a thief snatches the backpack out of your grasp. You are so surprised that you fail to resist. Is this robbery? The consensus is that the incident is not a robbery. This would qualify as robbery in the event that you are pushed, shoved, or struggled to hold on to the backpack. It is also robbery where force is applied to remove an item attached to your clothing or body, such as an earring or necklace. Does it make sense to distinguish between robbery and larceny based on whether the perpetrator employed a small amount of force?

The Model Penal Code attempts to avoid this type of technical analysis and provides that robbery requires "serious bodily injury." This approach has been rejected by most states on the grounds that it excludes street crimes in which victims are pushed to the ground or receive minor injuries. Before we leave this topic, we should note that it is a robbery when an assailant steals your personal items by rendering you helpless through liquor or drugs.

Property may also be seized as a result of intimidation or the fear of immediate infliction of violence. The threat of immediate harm must place the victim in fear, meaning in apprehension or in anticipation of injury.

The threat may be directed against members of the victim's family or relatives, and some courts have extended this to anyone present as well as to the destruction of the home. The threat must also be shown to have caused the victim to hand over the property.

Again, a threat may be "implied." This might involve a large and imposing panhandler who follows an elderly pedestrian down a dark and isolated street and angrily and repeatedly demands that the pedestrian "give up the money in his or her pocket." The threat must place the victim in apprehension of harm and cause him or her to hand over the property. The jury is required to find that the victim was actually frightened into handing over his or her property. Some courts require that a reasonable person would have acted in a similar fashion.

Mens Rea

The assailant must possess the intent to permanently deprive an individual of his or her property. The defendant may rely on the familiar defense that he or she intended only to borrow the property or was playing a practical joke. Courts are divided over whether it is a defense that the thief acted under a "claim of right," that the thief acted under an honest belief that the victim owed him money, or that the defendant reasonably believed that he or she owned the property. Some courts hold that even a claim of right does not justify the resort to force or intimidation to reclaim property.

Concurrence

The traditional view is that the intent to steal and the application of force or intimidation must coincide. The violence or intimidation must be employed for the purpose of the taking. This means that the threat or application of force must occur at the time of the taking. An individual does not commit a robbery who seizes property and then employs force or intimidation. A pickpocket who removes a victim's wallet and resorts to force only in response to the victim's accusation of theft is not guilty of robbery.

A number of states have followed the Model Penal Code in adopting language that provides that force or intimidation may occur "in the course of committing a theft." This is interpreted to mean that force or threat occurs "in an attempt to commit theft or in flight after the attempt or commission." The commentary explains that a thief's use of force against individuals in an effort to escape indicates that the thief would have employed force "to effect the theft had the need arisen." Even under this more liberal approach, an assailant who knocks the victim unconscious and then forms an intent to steal would not be guilty of robbery.[36] The Florida robbery statute defines robbery to include force or intimidation "in the course of the taking" of money or other property. This includes force or threats "prior to, contemporaneous with, or subsequent to the taking of the property . . . if it and the act of taking constitute a continuous series of acts or events."[37]

Grading Robbery

At common law, the theft of property that terrorized the victim resulted in the death penalty. Today, robbery statutes generally distinguish between simple and aggravated robbery. This is based on the degree of dangerousness caused by the defendant's act and the fear and apprehension experienced by the victim, rather than the value of the property. The factors that aggravate robbery include:

- the robber was armed with a dangerous or deadly weapon or warned the victim that the robber possessed a firearm;
- the robber used a dangerous instrumentality, such as a knife, hammer, axe, or aggressive animal;
- the robber inflicted serious bodily injury; and
- the robber carried out the theft with an accomplice.

You might question whether we need the crime of robbery. Is there any justification for the crime of robbery other than historical tradition? Why not simplify matters and merely charge a defendant with larceny along with assault and battery? The next case, *Messina v. State,* raises the issue of whether the application or threat of violence requirement in robbery should include force used to flee the crime scene.

The Statutory Standard

California Penal Code: Sections 211–212. Robbery

211. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

212. The fear mentioned . . . may be either:

(1) The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,

(2) The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

A number of states punish the crime of home invasion. Why is this singled out from the other types of robbery? Is this offense already punished by the crime of burglary?

Florida Statutes Section 812.135. Home-Invasion Robbery

(1) "Home-invasion robbery" means any robbery that occurs when the offender enters a dwelling with the intent to commit a robbery, and does commit a robbery of the occupants therein.

(2)(a) If in the course of committing the home-invasion robbery the person carries a firearm or other deadly weapon, the person commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment. . . .

Model Penal Code

Section 222.1. Robbery

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(a) inflicts serious bodily injury upon another; or
(b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
(c) commits or threatens immediately to commit any felony of the first or second degree.

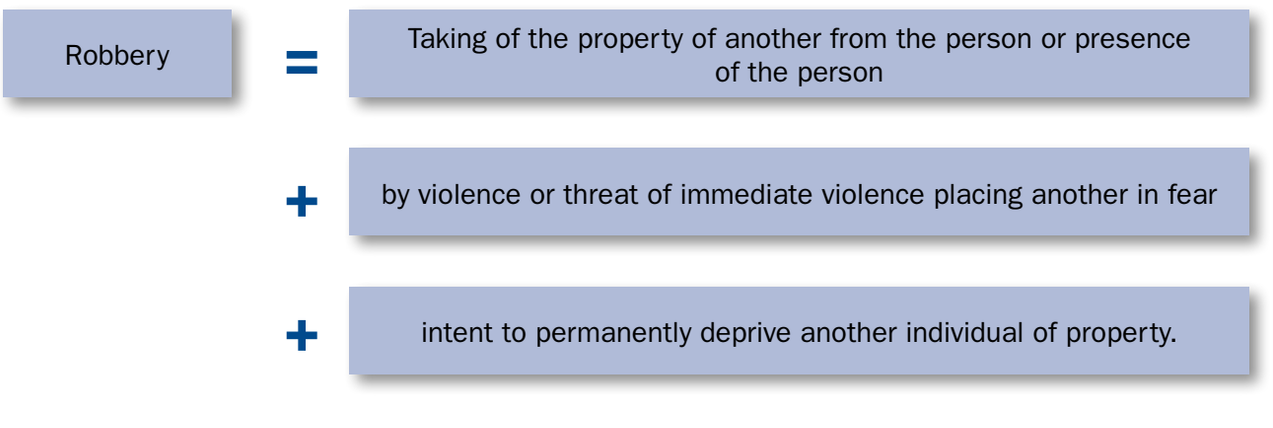
An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(2) Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily harm.

Analysis

- The infliction or threat of harm is limited to "serious bodily injury." The inclusion of the commission or threat to commit a felony of the first or second degree as an element of robbery is intended to encompass the threat or commission of serious injury to an individual other than the victim as well as the threat to destroy or the destruction of property.
- The harm may be inflicted or threatened "in the course of committing the theft." This includes violence or the threat of violence to obtain or retain property and to prevent pursuit or to escape.
- The commentary explains that the same punishment is imposed for both robbery and attempted robbery. It is immaterial whether the assailant actually succeeds in the taking of property. This reflects the view that the essence of robbery is the placing of individuals in danger rather than the deprivation of property.
- The infliction or threat of harm must be immediate.
- The taking is not required to be from the person or in the presence of the victim. An offender might threaten the victim in order to extract ransom from an individual who is not present.
- Robbery is generally punished as a felony of the second degree, subject to ten years' imprisonment. Life imprisonment is viewed as an extreme penalty that is reserved for violent offenders.

The Legal Equation



Did Messina take the property through force and/or violence?

Messina v. State, *728 So. 2d 818 (Fla. App. 1999), Opinion by: Padovano, J.*

Issue

The defendant, Karl C. Messina, appeals his conviction for the crime of robbery. He contends that the evidence is sufficient to support only the lesser crime of petit theft because there is no proof that he used force against the victim in taking her property. We conclude that the evidence is sufficient to support the main charge of robbery because the record shows that the defendant used force to retain the victim's property once he had taken it from her. Therefore, we affirm.

Facts

On December 14, 1996, Elaine Barker was in the parking lot of a K-Mart store unloading items from a shopping cart into the trunk of her car. She left her purse in the shopping cart, and while she was transferring the items she had purchased, the defendant came over, grabbed the purse, and ran away. Barker chased the defendant on foot and caught up with him, but by that time, he had gotten into his car and closed the door. Barker then sat on the hood of the defendant's car, thinking that would prevent him from driving away. Instead, the defendant started and stopped the car several times while Barker held on to a windshield wiper to keep from falling off. The defendant turned the car sharply causing Barker to fall to the ground. As a result of the fall, Barker suffered a broken foot and lacerations that required stitches.

Based on these facts, the State charged the defendant with the crime of robbery. At the close of the State's case in chief, the defendant moved for a judgment of acquittal, contending that the evidence was sufficient to sustain only the lesser included charge of petit theft. The trial court denied the motion and sent the case to the jury on the charge of robbery. The jury found the defendant guilty as charged, and he was convicted and sentenced for the crime of robbery.

Reasoning

The defendant contends that his conviction must be reversed because there is no evidence that he took the victim's purse by force. It is true, as the defendant argues, that a purse snatching is not a robbery if no force was used other than that necessary to take the victim's purse. In the present case, however, the charge of robbery was not based on the force used to remove the property from the shopping cart but rather on the force subsequently used against the victim once she tried to regain possession of her property. The question is not whether force was used but when it was used in relation to the taking.

A conviction for the crime of robbery requires proof that money or other property was taken from the victim and that the offender used force or violence "in the course of the taking." The temporal relationship between the use of force and the taking of the property is addressed in section 812.13(3)(b), which provides that "an act shall be deemed 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." As this definition reveals, the statute is not limited to situations in which the defendant has used force at the precise time the property is taken.

On the contrary, section 812.13 . . . incorporates the modern view that a robbery can be proven by evidence of force used to elude the victim or to retain the victim's property once it has been taken. The rationale for this view is that the force used in the flight after the taking of property is no different from that used to effect the taking. As explained in the Comments to the Model Penal Code, "the thief's willingness to use force against those who would restrain him in flight suggests that he would have employed force to effect the theft had the need arisen." . . . Florida courts have held that the crime of robbery can be proven by evidence that the defendant used force against the victim after the taking has been completed. . . . The common feature of these cases is that in each case, there was no break in the chain of events between the taking and the use of force.

Holding

In the present case, the defendant used force against the victim immediately after he had taken her property and while she was attempting to get it back. The force was used as a part of a continuous set of events beginning with the removal of the victim's purse from the shopping cart and ending with the victim's fall from the hood of the defendant's car. There was no interruption that would lead us to conclude that the subsequent battery on the victim was a new and separate offense. . . . Here, the taking and the use of force were part of the same offense.

The defendant suggests that the evidence is not sufficient to sustain his conviction for robbery because the injury to the victim was not foreseeable. He argues that it was unreasonable to expect that the victim would place herself in danger by sitting on the hood of his car. The

short answer to this point is that the defendant was not obligated to drive the car away. In any event, we decline to engraft concepts of tort law onto the statutory elements of robbery. Whether the defendant could have anticipated the victim's reaction is irrelevant. Likewise, whether the victim would have been wiser to allow the defendant to drive away with her property is irrelevant. The robbery statute merely requires proof that the force and the act of the taking were part of a "continuous series of acts or events." That was proven here.

Questions for Discussion

1. Why was Messina not charged with robbery based solely on his snatching of the victim's purse? Was the defendant's use of force part of a "continuous series of acts or events"?
2. Did the victim place herself at risk by her behavior?
3. Should courts limit the use of force for purposes of robbery to the time of the taking? Would it make more sense to punish the force used by Messina as a battery?

You Decide

13.7 At roughly 5 A.M., Alfonso Gomez broke into an Anaheim, California, restaurant. He covered two surveillance cameras with duct tape and broke open and took money from an ATM in the lobby. Gomez then went to the second floor and searched the manager's office for money. As Gomez went downstairs, he heard the manager, Ramon Baltazar, unlock the front door. Gomez removed a handgun from his backpack and went to the restaurant kitchen. Baltazar noted that the alarm had been deactivated and the ATM damaged, and he heard noise in the kitchen and saw the glow of a flashlight. He went outside to his truck and rang 911. As he spoke to the police dispatcher, Baltazar spotted Gomez exit a side door and walk away. Baltazar shadowed Gomez in his car at a distance of 100 to 150 feet. Gomez fired two shots at Baltazar, explaining that he wanted to scare Baltazar. Gomez drove away and was arrested shortly thereafter with money in his backpack. He was convicted of robbery and burglary. Robbery under the California statute is defined as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Taking has two aspects: (1) possession of property or caption and (2) carrying the property away or asportation. The asportation continues until the offender reaches a place of safety. Gomez contended on appeal that he did not take "property" from the "person or immediate person" of the defendant through "force or fear." Is Gomez guilty of robbery? See *People v. Gomez,* 179 P.3d 917 (Cal. 2008).

You Decide

13.8 Lamont Darrell Carter appealed his conviction for robbery and for conspiracy to commit common law robbery to a North Carolina appellate court. On May 20, 2004, Sean Rowlett, who worked for Express Teller Services, went to replenish an ATM machine in a grocery store. Rowlett carried a canvas bag inside of which was a plastic bag containing over $100,000 in cash. He placed the bag in a grocery cart and began to fill the ATM with cash. Rowlett felt a "spray" in the back of his head that he described as like a "water gun." He touched the back of his head, looked at his hand, and discovered that the spray was orange, and the back of his head began to burn. He believed that he might have been the victim of pepper spray or mace. Rowlett turned to his left toward the shopping cart and discovered that the bag containing the money was gone. He looked out the door and saw an individual running away with the sack who later turned out to be Carter. Rowlett had been instructed not to give chase, and he remained in the store and called the police. Was Carter properly convicted of robbery? See *State v. Carter,* 650 S.E.2d 650 (N.C. App. 2007).

You can find the answer at www.sagepub.com/lippmanccl2e

Carjacking

Carjacking is a newly recognized form of property crime that is punished under both federal and state statutes. California is typical in defining carjacking as a form of robbery and punishes the taking of a motor vehicle "in the possession of another, from his or her person or immediate presence . . . against his or her will." This must be accomplished by "force or fear." The perpetrator is not required to intend to permanently steal the automobile. The California statute is satisfied by an intent either to "permanently or temporarily deprive the victim of possession of the car."[38]

Several state statutes provide that force must be directed against an occupant of the car. The New Jersey statute requires that while committing the unlawful taking of the automobile, there must be the infliction or use of force against an occupant or person in possession or control of the motor vehicle.[39] Virginia stipulates that the taking be carried out by violence to the person, by assault, or by otherwise putting a person in fear of serious bodily injury.[40]

The trend is to find a defendant guilty of carjacking when an automobile is seized and not to require that the perpetrator move the automobile. A carjacking may be directed against an occupant of the car or against an individual outside the car who is in possession of the keys and is sufficiently close to control of the vehicle.

The punishment of carjacking is based on the degree of harm and apprehension caused by the offense. New Jersey punishes carjacking by between ten and twenty years in prison and a fine of up to $200,000. The Florida statute punishes carjacking with life imprisonment when committed with a firearm or other deadly weapon.[41]

Was Montero guilty of carjacking an immobilized automobile?

People v. Montero, *56 CAL. RPTR. 2D 303 (CAL. APP. 1996), Opinion by: Ortega, J.*

David Montero appeals from the judgment entered following his conviction by jury of carjacking, firearm assault, and second degree robbery, all with personal firearm use. . . .

Issue

Before Montero chased the victim away, the victim made his car inoperable. Montero thus dispossessed the victim and took possession of the car but was prevented from moving it. Montero argues that some movement of the car is necessary to complete a carjacking. Because he never moved the car, he concludes that he committed only attempted carjacking.

Facts

About 9:30 P.M. on October 7, 1993, Carlos Ocheita was driving his car northbound on Kingsley Street toward Melrose Avenue. Ocheita was alone and was headed home after leaving work and dropping off a friend. Ocheita slowed as he approached a stop sign at Kingsley and Melrose. A man crossed the street in front of him. Ocheita stopped. Montero approached the open driver's window, displayed a knife, grabbed Ocheita, and ordered him out of the car. As Ocheita got out, he hit an ignition "kill" switch hidden under the dash with his knee, immobilizing the car.

Montero sat in the driver's seat. When he could not start the car, Montero demanded that Ocheita tell him how to do so. Ocheita did not comply. Meanwhile, Montero's confederate entered the car through the front passenger door and found Ocheita's unloaded gun, which he used in his security guard job, under the seat. The confederate alerted Montero to his find and put the gun on the seat near Montero. Montero grabbed the gun, pointed it at Ocheita, and told him to leave. Ocheita refused. Montero pointed the gun at Ocheita and twice pulled the trigger. Ocheita heard two clicks. Montero looked at the gun and demanded that Ocheita give him the ammunition. When Ocheita refused, Montero hit him in the face with the gun and knocked him down. As a result, Ocheita lost six teeth and required stitches to close facial wounds.

Ocheita ran away and immediately called the police from a pay telephone. The police responded within minutes and drove Ocheita back to the crime scene. They found Ocheita's assailants gone and his car where he had

left it with the kill switch still engaged. The car had not been moved. Only Ocheita's gun was gone. Ocheita later deactivated the kill switch and drove his car home.

Issue

Based on the similarity in the wording and elements of carjacking and robbery, Montero argues that carjacking is a type of robbery. As the People concede, movement is required to complete a robbery. A robber must take the victim's property by some movement, however slight, to complete the robbery. Without movement of the loot, the crime is only attempted robbery. Likewise, Montero argues, movement is an element of carjacking. If the carjacker fails to move the car, the crime is only attempted carjacking. Since he never moved the victim's car, Montero concludes that the evidence was insufficient as a matter of law to support his carjacking conviction. . . .

Despite their concession that movement is required to complete a robbery, the People argue the Legislature intended that a carjacking is complete when the carjacker forcibly deprives the victim of possession and control of the car, even if the carjacker never moves the car. Since any, even the slightest, movement is sufficient to complete a robbery, the People argue that depriving the carjacking victim of possession and control of his car is the functional equivalent of slight movement, given the physical difficulty of quickly moving a car. . . .

Reasoning

Section 215, added to the Penal Code effective October 1, 1993, states: "(a) 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear. (b) Carjacking is punishable by imprisonment in the state prison for a term of three, five, or nine years." . . . The issue we must decide is what is necessary to satisfy the taking requirement of carjacking.

Carjacking, robbery, and unlawful vehicle taking all require that the loot be "taken" to complete the crime. The elements of carjacking are: "1. A person had possession of a motor vehicle; 2. The motor vehicle was taken from his or her person or immediate presence . . . ; 3. The motor vehicle was taken against the will of the person in possession; 4. The taking was accomplished by means of force or fear; 5. And the person taking the vehicle had the intent to either permanently or temporarily deprive the person in possession of the vehicle of that possession."

In California, unlike some other jurisdictions, the taking necessary to complete the crimes of robbery and unlawful vehicle taking requires some movement, however slight and however short in duration. . . .

In the carjacking context, however, we think a mechanical insistence that the car must be moved would frustrate both the Legislature's intent in proscribing carjacking and the realities of taking motor vehicles. As discussed above, carjacking is distinct from, and not just a form of, robbery. The reason for the creation of this new crime was the considerable increase in the number of persons who have been abducted; many have been subjected to the violent taking of their automobile, and some have had a gun used in the taking of the car. This relatively "new" crime appears to be as much thrill-seeking as theft of a car. If all the thief wanted was the car, it would be simpler to hot-wire the automobile without running the risk of confronting the driver. People have been killed, seriously injured, and placed in great fear, and this calls for a strong message to discourage these crimes. Additionally, law enforcement is reporting that this new crime is becoming the initiating rite for aspiring gang members and that the incidents are drastically increasing. . . . Many carjackings cannot be charged as robbery because it is difficult to prove the intent required of a robbery offense (to permanently deprive one of the car) since many of these gang carjackings are thrill-seeking thefts. . . .

Carjacking is a violent, assaultive crime, in which particularly vulnerable victims, trapped in their cars, are confronted, often, as here, with weapons, and forced from their cars. We are confident that any carjacking victim, and the Legislature, would consider the carjacking complete where, as here, the victim is dragged from his car at knife point and driven away by pistol-whipping, abandoning his car to his attacker, who then tries to move it but is prevented from doing so by the victim's artifice in activating a kill switch. Whether the victim prevents the car's movement by taking his keys or the attacker is so inept that he cannot start it before fleeing to avoid being caught makes no difference. Smaller, lighter personal property would always have been taken by that point. Only the car's bulk prevents it from being taken without starting. Moreover, the terrorized victim who is forced to flee has lost his car just as surely as if he watches the attacker drive it away. Likewise, the robbery in *Quinn* would have been just as complete if the robber had forced the victim to leave his wallet on the ground rather than taking it with him.

Holding

At least in this context, we do not think we should engraft a judicial "asportation" or movement requirement onto the statutory requirement that the carjacker "take" the car. Doing so essentially changes the language from the statutory "taking" to a common law "taking and carrying away" requirement. "Commission of the crime of larceny requires a taking (caption) and carrying away (asportation) of another's property. A taking occurs when

the offender secures dominion over the property, while a carrying away requires some slight movement away of the property." . . . However, many states, and the Model Penal Code, have eliminated the "carrying away" requirement for larceny based crimes. In the carjacking context, we agree that "the common law asportation requirement is generally of no significance today, as theft offenses in the modern codes are usually defined without resort to that concept. In this respect, these statutes follow the Model Penal Code. While this abandonment of the asportation requirement has sometimes been criticized, the Code position is sound. If the defendant has taken control of the property, then it is of no penological significance whether or not he has in any sense engaged in a carrying away of that property."

In the carjacking context, under the facts before us, Montero has committed a series of objectively verifiable acts that constitute carjacking. He used force to seize control of Ocheita's car for himself, tried to force Ocheita to tell him how to start the car, and used additional force to dispossess Ocheita's possession and chase him away. He tried to start the car, demonstrating that these objectively violent acts were coupled with the required intent to temporarily or permanently take the car, assuring society we are not punishing him for bad thoughts alone. Montero concedes as much but claims his acts were not enough to complete the crime but were sufficient only to be an attempt. As discussed above, we disagree. When, under these circumstances, Montero chased Ocheita away, the carjacking was as complete as if Montero had driven the car around the corner, leaving Ocheita standing outside. This is not a situation that violates the rule that "even bad thoughts plus action do not equal a particular crime if the action is not that which the definition of the crime requires."

We conclude that the "taking" required for a completed carjacking . . . requires either some movement of the car or seizure of possession and control by forceful dispossession of the victim's possession and control. Because Montero satisfied the second of these requirements, he completed the carjacking. . . .

Questions for Discussion

1. Why does the court conclude that it is unnecessary on these facts that there be an "asportation" of an automobile for a carjacking? Was the defendant correct in arguing that this judicial ruling "would make one who prevented a drunken person from entering his car, thus preventing the inebriate from illegally driving under the influence, guilty of carjacking"?
2. What is the reason for the separate crime of carjacking? Why not merely punish carjacking as robbery or "joy riding"?
3. Can an individual carjack an automobile that is stalled and will not start?

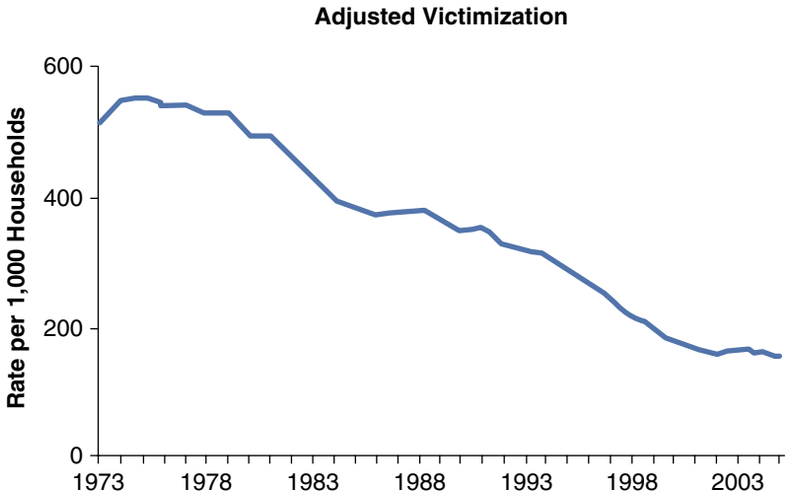
You Decide

13.9 Christopher Coleman was convicted by a California jury of carjacking and appealed his conviction on the grounds that there was "insufficient evidence to support his conviction for carjacking." Oscar Aguayo owned Tony's Glass Service and drove a Chevrolet truck for business purposes and a white Chevrolet Silverado truck for personal business. On December 10, 2004, he arrived at work at 8 A.M. and parked the Silverado. He placed the car keys to the Silverado in a closet in the back work area of the repair shop and left the premises. Several hours later, Coleman walked into the shop, and the officer manager, Ms. Ortega, explained to Coleman that they did not repair auto glass and that they could not repair his windshield. At 5 P.M., Ortega was preparing to leave when Coleman walked back into the shop and demanded the keys to the truck. Ortega got up from the desk, and the appellant followed her with a gun pointed at her head and again stated that he wanted the keys to the truck. Ortega walked to the back of the shop, opened the closet, and gave the appellant the keys to the Silverado, which Coleman then drove away. Carjacking in California is defined as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." Compare the facts in *Coleman* to the facts in *Montero.* As a judge, how would you decide this case? See *People v. Coleman,* 146 Cal. App. 4th 1363 (Cal. App. 2007).

You can find the answer at www.sagepub.com/lippmanccl2e

Figure 13.1 Crime on the Streets: Property Crimes

Property crimes fell 22.7% between 1996 and 2006. In recent years, there has been a slight increase in property crimes.



Source: The National Crime Victimization Survey, U.S. Department of Justice.
Note: Property crimes include burglary, theft, and motor vehicle theft.

Extortion

The common law misdemeanor of **extortion** punished the unlawful collection of money by a government official. William Blackstone defined extortion as "an abuse of public justice, which consists in any officer's unlawful taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due."[42]

The law of extortion was gradually expanded to punish threats by private individuals as well as public officials. The elements of the statutory crime of extortion are as follows:

- The taking of property from another by
- a present threat of future violence or threat to circulate secret, embarrassing, or harmful information; threat of criminal charges; threat to take or withhold official government action; or threat to inflict economic harm and other harms listed in the state statute, with
- a specific intent to deprive a lawful possessor of money or property.

Note that while robbery involves a threat of immediate violence, extortion entails a threat of future violence or other harms. The threat to disclose secret or embarrassing information is commonly referred to as the crime of **blackmail**. Robbery must be committed in the presence of the victim, while extortionate threats may be communicated over the phone or in a letter.

The majority of state statutes provide that the crime of extortion is complete when the threat is made. The prosecution must demonstrate that the victim believed that there was a definite threat and believed that this threat would be carried out. A Michigan statute punishes "any person who shall . . . maliciously threaten to accuse another of any crime . . . or . . . maliciously threaten any injury to . . . [a] person or property . . . with intent to thereby . . . extort money or any pecuniary advantage . . . or . . . to compel the person to do . . . any act against his will."[43]

Other statutes require the handing over of money, property, or valuable items in response to the threat. The prosecution must establish a causal relationship between the threat and the conveying of the money or property. The "handing over" requirement is illustrated by the language of the New York statute, which provides that an individual is guilty of extortion when he or she "compels . . . another person to deliver . . . property to himself or to a third person by means of instill[ing] . . . fear."[44]

The object of extortion may be money, property, or "anything of value," including labor or services. The Iowa Supreme Court ruled that a college student who attempted to extort a date from a female acquaintance had attempted to extort "something of value for himself" and that value should be broadly interpreted to include "relative worth, utility, or importance" rather than "monetary worth."[45]

Harrington, a divorce lawyer, represented a female in a divorce action who had been the victim of severe physical abuse by her husband. Harrington arranged for a female to seduce the husband, and while the two were in a romantic embrace in bed, Harrington entered and took photographs. Harrington subsequently threatened to disclose the husband's adultery unless he paid his wife a divorce settlement of $175,000. The Vermont Supreme Court ruled that Harrington "acted maliciously and without just cause . . . with the intent to extort a substantial fee . . . to [Harrington's] personal advantage."[46]

Several commentators contrast extortion with *bribery*. Extortion involves taking money, property, or anything of value from another through threat of violence or harm. In bribery, money or a valuable benefit is offered or provided to a public official in return for an official's action or inaction. This act may involve a legislator voting in favor or against a law, a judge acquitting or convicting a defendant, or a clerk giving priority to an applicant for a driver's license or passport or may entail a failure to act, such as a building inspector overlooking safety violations in a music club. There must be an intent to corruptly influence an official in the conduct of his or her office. Individuals are held guilty of bribery for offering as well as accepting a bribe. We will discuss bribery in greater detail in Chapter 14 on white-collar crime.

Chapter Summary

The common law initially punished only the violent taking of property. This soon proved insufficient. Individuals accumulated farm animals, crops, and consumer goods that were easily stolen by stealth and under the cover of darkness. Larceny developed to protect individuals against the wrongful taking and carrying away of their personal property by individuals harboring the intent to deprive the owner of possession. The economic development of society resulted in clear shortcomings in the coverage of the law that led to the development of embezzlement, false pretenses, and receiving stolen property.

Embezzlement was introduced by the English Parliament to fill a gap in the law of larceny. Embezzlement involves the fraudulent conversion of the property of another by an individual who is in lawful possession of the property. Some statutes extend embezzlement to real (real estate) as well as personal property. The English Parliament also introduced false pretenses to punish individuals who obtain title and possession of the property of another by a false representation of a present or past material fact with the intent to defraud that causes an individual to pass title to his or her property.

A number of states have consolidated larceny, embezzlement, and false pretenses into a single theft statute. These statutes provide a uniform grading of offenses and, in some states, serve to prevent a defendant from being acquitted based on the prosecutor's failure to satisfy the technical factual requirements of the property crime with which the defendant is charged. The grading of larceny, embezzlement, and false pretenses is generally based on the monetary value of the property. Modern theft statutes also provide protection to all varieties of personal property and do not distinguish between tangible (physical objects) and intangible (legal documents) personal property. As noted, various states also extend protection to real property (real estate).

Two new forms of criminal conduct provide a challenge to the law. Identity theft is the fastest growing crime and involves the stealing of individuals' personal information and the use of this information to make purchases or to borrow money. States have responded to computer theft and cybercrime by passing statutes punishing a range of computer offenses, including the unauthorized access to computers, computer networks, and programs and causing computers to malfunction.

Forgery involves the creation of a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others. The crime of forgery is complete upon the drafting and modification of the document with the intent to defraud others, regardless of whether the document is actually used to commit a fraud. Uttering is the separate offense of circulating or using a forged document.

Robbery is a crime that threatens both the property and the safety and security of the individual. It involves the taking of personal property from the victim's person or presence through violence or intimidation. The grading of robbery depends on the harm inflicted or threatened. The use of a firearm is subject to particularly severe punishment. Carjacking is an increasingly prevalent offense that involves the use of force to unlawfully gain control and possession over a motor vehicle. Extortion is the taking of property from another through the threat of future violence; the threat to circulate secret, embarrassing, or harmful information; the threat to bring criminal charges; the threat to take or withhold official government action; or the threat of economic harm.

All the offenses in this chapter involve the seizure of the property of another individual through unlawful taking, fraud, or force.

Chapter Review Questions

1. Provide an example of how the common law of larceny developed in response to the growth of business and commerce.
2. Distinguish between the requirements of larceny, embezzlement, and false pretenses.
3. Why did various states adopt consolidated theft statutes?
4. Describe the harm to society caused by identity theft. What is the reason that states found it necessary to adopt new criminal statutes punishing identity theft?
5. Why have states passed legislation to address computer crimes rather than using existing statutes punishing crimes against property? What types of acts are prohibited under these statutes?
6. What is a prosecutor required to prove beyond a reasonable doubt in order to establish the crime of receiving stolen property? How does the punishment of this offense deter theft?
7. What is the difference between forgery and uttering?
8. How does robbery differ from larceny?
9. Distinguish robbery from extortion.
10. What are the elements of carjacking?
11. How do courts interpret the "taking and carrying away" element of larceny? Why did the common law require a "carrying away" of property?
12. Discuss the use or threat of harm requirement in regard to robbery.
13. What are some of the factors that aggravate a property offense?
14. Write an essay briefly summarizing property crimes. Address whether we still require the various property offenses that were developed by the common law.

Legal Terminology

blackmail
carjacking
computer crime
custody
embezzlement
extortion
false pretenses
forgery
grand larceny
identity theft
larceny
larceny by trick
petit larceny
possession
receiving stolen property
robbery
simulation
theft statutes
uttering

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Explore computer crime on the Department of Justice Web site.
2. The federal carjacking statute requires the taking of an automobile by force, violence, or intimidation with an intent to cause death or serious bodily harm. In *Holloway v. United States,* in 1999, one of the defendants claimed that although the carjackers possessed the intent to take the vehicles, they did not harbor the required intent to seriously harm the occupants. He claimed that the carjackers would have inflicted serious harm only on a driver who gave them a "hard time" (a "conditional intent"). Should the Supreme Court affirm or overturn their convictions?
3. Read about the notorious forgery of the Hitler diaries. How were the experts fooled?
4. Learn about identity theft.

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14 White-Collar Crime

Were the corporate defendants guilty of polluting groundwater?

While the solvents were handled at the Thoro facility, it was not uncommon for there to be a significant amount of spillage. Former employees of Thoro testified that spills occurred as a result of overfilled tank cars, leaky pumps and hoses, or accidents. Newman recounted three major spills—estimated to have discharged up to several hundred gallons of solvents—during the 1970s. Although the storage tanks were placed upon small concrete pads, the areas between the tanks and the rail tracks and between the tanks and the truck loading area were unpaved. It was therefore almost certain that a substantial amount of the solvents seeped into the soil. . . . In the spring of 1995, high concentrations of chlorinated solvents were discovered in a water well at the Twins Inn bar and restaurant, located approximately one mile from the Thoro facility. . . .

Core Concepts and Summary Statements

Introduction

White-collar crime is variously defined based on the social class of offenders, nature of the criminal violations, or specific statutory violations. White-collar crime offenses are typically committed in the regular course of business in an effort to make money or to avoid commercial expenses. These crimes involve a betrayal of the trust that we place in business and government.

Environmental Crimes

Federal statutes punish the pollution of navigable and tributary waters, wetlands, drinking water, and air and the failure to follow standards regulating pesticides and toxic chemicals.

Occupational Health and Safety

The Occupational Safety and Health Act criminally punishes willful violations that result in death.

Securities Fraud

Federal prosecutions for security fraud focus primarily on insider trading, the use of corporate information and data not available to the public to buy and sell securities (stocks and bonds).

Mail and Wire Fraud

Mail and wire fraud statutes punish participation in a scheme or artifice to obtain money or property through the use of the mails or wires.

The Travel Act

The Travel Act prohibits interstate or foreign travel or travel on any facility in interstate or foreign commerce with the intent to distribute the proceeds of an unlawful activity, to commit a crime of violence to further an illegal activity, or to promote an unlawful activity. The act is intended to serve as a tool against organized crime.

Health Care Fraud

The health care fraud statute punishes individuals who knowingly and willfully execute or attempt to execute a scheme or artifice to defraud any health care benefit program or to fraudulently obtain money or property from any health benefit program.

Money Laundering

Money laundering is a financial transaction involving proceeds or property derived from an illegal activity.

Antitrust Violations

The Sherman Act of 1890 punishes any combination or conspiracy to interfere with interstate commerce.

Public Corruption

A. Crimes of official misconduct are defined as knowingly corrupt behavior by a public official in exercising his or her official responsibilities.
B. Bribery is a form of public corruption and entails promising, offering, giving, or requesting money or any item of value in exchange for an official decision, action, or inaction.

Introduction

In 1949, sociologist Edwin H. Sutherland published his pioneering study, *White Collar Crime*. This volume called attention to the largely overlooked criminal behavior of business managers, executives, and professional groups, which Sutherland labeled **white-collar crime**. Sutherland defined white-collar crime as an offense committed by a "person of respectability and high social status in the course of his [or her] occupation." This definition stresses the social background of offenders and focuses on nonviolent offenses committed in the course of employment. Sutherland's central thesis is that theories that explain crime based on poverty, low social class, and lack of education fail to account for "crimes in the suites." The focus on the poor and disenfranchised diverts our attention from the fact that the financial cost of white-collar crime is several times greater than the economic consequences of common crimes. A second point raised by Sutherland is that despite the social harm caused by the crimes of the powerful, these offenses are typically punished by fines and less severe penalties than the offenses committed by average individuals.[1]

The U.S. Justice Department's definition of white-collar crime focuses on the nature of the criminal activity as well as on the job of the offender. This definition also does not limit white-collar crime to employment-related offenses. White-collar crime is defined as follows:

- Illegal acts that employ deceit and concealment rather than the application of force;
- to obtain money, property, or service;
- to avoid the payment or loss of money or to secure a business or professional advantage.
- White-collar criminals occupy positions of responsibility and trust in government, industry, the professions, and civil organizations.

A third approach defines white-collar crime in terms of the type of criminal activity involved. This has the advantage of drawing attention to the fact that tax and consumer fraud and other offenses characteristic of white-collar crime are committed by individuals of various socioeconomic backgrounds.

You might want to review our previous discussions of corporate criminality. In previous chapters, we discussed the vicarious and strict liability of business owners for regulatory (social welfare) offenses (Chapter 5) and considered the merits of holding corporations as well as individual executives liable for homicide (Chapter 11). You also should keep in mind that many of the property offenses we reviewed (Chapter 13) often are committed by corporate criminals in the course of carrying out fraudulent schemes. This includes larceny, false pretenses, embezzlement, extortion, and bribery.

The focus of the present chapter differs from our previous discussions in that most white-collar crime prosecutions are brought by the U.S. government rather than by state and local officials. You may recall that we discussed the division between federal and state powers in Chapter 1. In this chapter, we primarily examined the federal statutes that most frequently are used to combat white-collar crime, which includes the following:

- *Environmental Crimes.* Offenses harming and polluting the environment.
- *Occupational Health and Safety.* Injury and harm to workers.
- *Securities Fraud.* Manipulation of stocks and bonds.
- *Mail and Wire Fraud.* The use of the mail and telephone to commit a fraud.
- *The Travel Act.* Committing certain offenses through the use of interstate travel or the mail.
- *Health Fraud.* Obtaining reimbursement or payment for unwarranted and undelivered medical treatments.
- *Money Laundering.* Transactions involving money derived from illegal activities.
- *Antitrust Violations.* Interference with the competitive marketplace.
- *Public Corruption.* Betrayals of the public trust by government officials.

White-collar crime offenses are typically committed in the regular course of business in an effort to make or save money. These offenses generally involve a betrayal of the trust that we place in business and government. Let me caution that this chapter does not cover the entire field of white-collar crime. Some areas, such as tax evasion and accounting fraud, are not discussed.

Despite the fact that white-collar crime is one of the most active areas of federal prosecution, textbooks generally do not devote significant attention to the subject. This is partially based on the belief that white-collar crime is not a distinct category of crime. It is argued that there is little difference between the theft of money by a corporate executive and the theft of money by a waitress or the theft of tools by a construction worker. As you read this chapter, consider whether the concept of white-collar crime is useful. Should we pay special attention to "crimes in the suites"? Do you believe that the government should devote additional resources to the prosecution and punishment of corporate misconduct? Another question concerns the appropriate form of punishment for white-collar offenders. Should respectable business executives be punished like any other criminal? We begin the chapter with environmental crimes to illustrate the harm that can result from white-collar crime.

Environmental Crimes

At times, the drive for corporate profit may lead business executives to disregard their legal obligation to protect the natural environment. There are considerable costs involved in environmental safety and cleanup that can absorb a significant percentage of corporate revenues. The FBI notes that **environmental crimes** threaten the health and natural resources of the United States and that such crimes range from air and water pollution to the illegal transportation and disposal of hazardous waste.

Americans were exposed to the potential danger that illegal business practices pose to the environment, when a public health emergency was declared at Love Canal in Niagara Falls, New York. In 1978, a local paper reported that in 1953, Hooker Electro-Chemical Company had buried more than 21,000 tons of toxic waste on land that the company and city government knew was now the site of a housing development and school. Studies revealed that women living nearby experienced an excessive rate of miscarriages and that children suffered high rates of birth defects and disorders of the nervous system. The state and federal government ultimately evacuated the area at a cost of over $42 million, and the area would not be reclaimed for housing until 1990. A second well-known case in Woburn, Massachusetts, in 1979, involved the pollution of the water supply by industrial waste. The industrial firms responsible for the pollution ultimately agreed to a cleanup that cost more than $70 million.

In 1980, Pennsylvania authorities discovered that Hudson Oil Refining Corporation of New Jersey had been dumping waste down an old mine shaft. The waste accumulated and, in July 1979, began pouring out of the mine tunnel into the Susquehanna River. Millions of gallons of toxic waste linked to cancer and birth defects formed an oil slick that threatened the water supply of Danville, Pennsylvania. The company was fined $750,000, and the president of Hudson Oil, the first corporate official imprisoned for illegal environmental dumping in American history, was sentenced to one year in prison. In the mid-1980s, Pennsylvania convicted a corporate executive of illegally dumping 10,000 drums of waste in a Scranton, Pennsylvania, landfill.

In 1989, Rockwell International, a company that had managed the Rocky Flats nuclear weapons plant since 1975, pled guilty to ten federal counts and paid $18.5 million in fines stemming from its mismanagement of the 6,500-acre site fifteen miles northwest of Denver, Colorado. The plant was described as being littered with over 12.9 metric tons of dangerous plutonium, asbestos, lead, and other toxic chemicals.

On March 24, 1989, the oil tanker *Exxon Valdez* ran aground in Alaska, spilling eleven million gallons of oil into Prince William Sound and polluting roughly 1,300 miles of Alaska shoreline. Exxon agreed to pay a $150 million criminal fine. In 2008, the U.S. Supreme Court reduced the civil monetary judgment imposed on Exxon by a jury. The court did affirm the jury's judgment that Exxon was responsible for the actions of the ship's captain, finding that the jury could have reasonably concluded that Exxon "knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil" and that "it was only a matter of time before a crash or spill . . . occurred."

Today, the increased concern with environmental crimes has led the federal and various state governments to establish special prosecution units. The federal government now highlights the seriousness of these offenses through an annual National Environmental Crime Prevention Week. The national dedication to combating environmental crime is illustrated by a recent federal case in which Department of Justice prosecutors obtained the conviction of two individuals for violating the Clean Air Act and the Toxic Substances Control Act. This resulted in the longest federal jail sentences for environmental crimes in history. Alexander Salvagno received twenty-five years in prison and was ordered to forfeit more than $2 million in illegal proceeds and to provide more than $23 million in restitution to the victims. His father, Raul Salvagno, was sentenced to nineteen years in prison and was required to forfeit close to $2 million in illegal proceeds and to pay more than $22 million in restitution. The two falsely represented to clients that they had completely removed dangerous toxic asbestos from homes and schools and directed their young workers to enter into asbestos "hot zones" without adequate protection, exposing more than 500 of their employees to the risk of cancer.

The FBI reports that at any given time, there are roughly 450 environmental criminal cases pending, roughly half of which involve violations of the Clean Water Act. The FBI's investigative priorities are protecting workers against hazardous wastes and pollutants, preventing large-scale environmental damage that threatens entire communities, pursuing organized crime interests that illegally dump solid waste, and monitoring businesses with a history of damaging the environment. The FBI reminds us that a single instance of dumping can poison a river and cost the public millions of dollars in cleanup costs. In Tampa, Florida, Durex Industries repeatedly disregarded warnings to safely dispose of hazardous materials used in the manufacture of aluminum cans. In 1993, two nine-year-old boys playing in a dumpster died when they were overcome by fumes from materials that Durex illegally discarded. The company was ordered to pay a $1.5 million fine, and several Durex officials were criminally convicted.

Most prosecutions for environmental crimes are undertaken by the federal government. Criminal provisions and penalties are typically incorporated into civil statutes regulating the environment. Investigations in this area, for the most part, are carried out by the Environmental Protection Agency (EPA), which refers matters to the Department of Justice for criminal prosecution. The central environmental laws include:

- *The Refuse and Harbors Appropriations Act (1899).* Imposes criminal penalties for improper discharge of refuse (foreign substances and pollutants) into navigable or tributary waters of the United States.
- *Water Pollution Control Act (1972).* Imposes criminal penalties for the discharge of certain pollutants beyond an authorized limit into navigable waterways and a prohibition on unauthorized dredging, the filling of wetlands, and the failure to clean up oil and other hazardous substances.
- *Resource Conservation and Recovery Act (1976).* Punishes knowingly storing, making use of, or disposing of hazardous wastes without a permit. Severe penalties are imposed for placing individuals in danger.
- *Clean Air Act (1990).* Imposes criminal penalties for the knowing violation of emission standards and other related requirements.
- *Safe Drinking Water Act (1974).* Prohibits contamination of the public water system.
- *Toxic Substance Control Act (1976).* Imposes criminal penalties for the failure to follow standards for use of toxic chemicals in manufacturing and industry.
- *Fungicide and Rodenticide Act (1996).* Imposes criminal penalties for the failure to follow standards for the manufacture, registration, transportation, and sale of toxic pesticides.

The *mens rea* for these statutes is generally knowingly committing the prohibited act. A defendant is not required to have knowledge that the act is contrary to a federal statute or that the act poses a health hazard.[2]

Our next case, *People v. Thoro Products Company & Newman,* illustrates the threat that hazardous materials pose to the water supply and raises an interesting issue concerning the definition of the term *disposal* under a Colorado environmental statute.

Was the prosecution of the defendants for contaminating the water supply barred by the statute of limitations?

People v. Thoro Products Company & Newman, *70 P.3D 369 (COL. 2003), Opinion by: Rice, J.*

The People urge this court to reinstate respondents' convictions for unpermitted disposal of hazardous waste. The court of appeals reversed the convictions after concluding that the prosecution of the respondents was barred by the applicable statute of limitations. We affirm the judgment of the court of appeals.

We hold that the plain language of the statute, the apparent legislative policies underlying the statute, and the various federal interpretations of the term *disposal,* do not provide a clear answer to the question presented herein, namely, whether the legislature intended the passive migration of waste to constitute the crime of unpermitted "disposal" of hazardous waste. We therefore conclude that the respondents did not have adequate notice of the conduct the statute was intended to prohibit; specifically, the respondents did not have notice that their failure to remediate contaminated soil and prevent the passive migration of previously spilled waste would constitute a continuing crime such that they would be subject to the possibility of criminal charges twelve years after the last affirmative act of disposal. Based on the rule of lenity, we accordingly construe this ambiguity in favor of the respondents and hold that their prosecution is barred by the statute of limitations.

Facts

Thoro Products Company Inc. and its CEO, Richard E. Newman, were accused of various crimes in connection with the unpermitted storage and disposal of hazardous waste. Thoro, a manufacturer of spot remover and other cleaning products, was founded in 1902 by Newman's grandfather. After World War II, Newman's father became president of the company, and the business was moved to its current location, an industrial area served by a railroad spur in Arvada.

Respondent, Richard E. Newman, began working for Thoro in 1974. He worked in several different roles in the business and soon rose to a supervisory position. Following his father's retirement in 1987, Newman became the president and CEO of the company.

This case arose as a result of Thoro's twenty-year business relationship with Dow Chemical Company. In 1964, as part of a plan to diversify its operations, Thoro became a bulk distribution facility for Dow. Dow shipped various chemicals to Thoro where they were pumped from railcars into several above-ground storage tanks. Thoro would later pump the chemicals from the storage tanks into trucks for shipment to Dow's customers. Among the Dow chemicals shipped to Thoro were four types of chlorinated solvents later identified by the EPA to be potentially hazardous wastes. These four solvents led to the plume of contamination at issue here.

While the solvents were handled at the Thoro facility, it was not uncommon for there to be a significant amount of spillage. Former employees of Thoro testified that spills occurred as a result of overfilled tank cars, leaky pumps and hoses, or accidents. Newman recounted three major spills—estimated to have discharged up to several hundred gallons of solvents—during the 1970s. Although the storage tanks were placed upon small concrete pads, the areas between the tanks and the rail tracks and between the tanks and the truck loading area were unpaved. It was therefore almost certain that a substantial amount of the solvents seeped into the soil.

The contract with Dow came to an end, and Thoro stopped handling solvents at some point during 1984 or 1985, several years before Newman became CEO of the company. Eventually, the company's fortunes declined, and by 1997, Thoro was officially dissolved as a Colorado corporation.

In the spring of 1995, high concentrations of chlorinated solvents were discovered in a water well at the Twins Inn bar and restaurant, located approximately one mile from the Thoro facility. The EPA began an investigation to determine the source of the groundwater contamination and eventually removed soil samples from the Thoro property. Based upon the nature and extent of the contamination found around the storage tanks, the EPA concluded that Thoro was responsible for the mile-long plume of contaminated groundwater.

In November 1996, the EPA, along with local law enforcement agents, executed a search warrant at the Thoro property and seized a variety of documents and records relating to Thoro's business relationship with Dow. Authorities also discovered several 55-gallon drums, which, later analysis revealed, contained a mixture of various hazardous solvents.

Thoro Products Company Inc. and Richard E. Newman were each indicted on three charges: (1) Unpermitted disposal of hazardous waste; (2) Unpermitted storage of hazardous waste; and (3) Criminal mischief, a class three felony.

After a two-week trial, Thoro was convicted of all three charges. The company was sentenced to probation for ten years and assessed a fine of $750,000 for criminal mischief, $100,000 for unpermitted disposal, and $100,000 for unpermitted storage. Newman was convicted of two

charges, unpermitted disposal and unpermitted storage of hazardous waste. During sentencing, the trial court found extraordinary aggravating circumstances and sentenced Newman to consecutive terms of incarceration of eight years for unpermitted disposal and six years for unpermitted storage.

Issue

The court of appeals reversed both respondents' convictions for unpermitted disposal, concluding that they were barred by the statute of limitations. The statute of limitations provides that criminal charges must be brought within two years after discovery of the violation or within five years after the date on which the alleged violation occurred, whichever date occurred earlier. Respondents argued that the last act of disposal occurred no later than 1985 and that, therefore, the prosecution was barred. The People countered that the definition of *disposal* in the statute is broad enough to encompass the passive migration of waste in the soil or groundwater. Although Thoro's handling of the solvents had ceased, they were still "disposing" of hazardous waste because the waste continued to seep through the soil on their property. The court of appeals agreed with the respondents and reversed their convictions.

We review this case in order to determine whether the passive migration of previously leaked or spilled hazardous solvents constitutes "disposal." . . . Respondents were convicted of unpermitted disposal of hazardous waste in violation of section 25–15–310(1)(b), 8 C.R.S. (2002). That section provides:

On or after [November 2, 1984], no person shall . . . treat, store, or dispose of any hazardous waste identified or listed pursuant to this article . . . without having obtained a permit as required by this article . . .

An act of disposal is defined to include:

> . . . the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters. Section 25–15–101(3), 8 C.R.S. (2002).

Criminal charges under this statute must be brought within two years after the date upon which the department [of public health and environment] discovers an alleged violation . . . or within five years after the date upon which the alleged violation occurred, whichever date occurs earlier . . .

Reasoning

To decide the applicability of the statute of limitations, we must determine when the alleged violation—unpermitted disposal of hazardous waste—occurred. Normally, a statute of limitations begins to run when the crime is complete: when all its substantive elements have been satisfied. In this case, all the elements of the crime were satisfied at the moment Thoro's employees knowingly allowed solvents to spill into the soil without first obtaining a permit.

However, in certain circumstances, a crime continues beyond the first moment when all its substantive elements are satisfied. In such a continuing offense, the crime continues (and the statute of limitations does not begin to run) so long as the illegal conduct continues. . . .

The crime of unpermitted disposal of hazardous waste has essentially three elements. To be convicted, a defendant must (1) knowingly (2) dispose of hazardous waste (3) without a permit. The failure to obtain a permit is merely one element. The People must still show that respondents—within the five years prior to their indictment—were "disposing" of hazardous waste. Therefore, the outcome of this case depends on the meaning of the term *disposal*.

In the People's view, the definition of *disposal* includes the passive migration of solvents through the groundwater. Although the respondents have not placed any solvents into the ground since 1985, the People assert that the respondents are continuing to "dispose" of the chemicals because the spilled solvents are still seeping through the soil.

On the other hand, respondents contend that *disposal* includes only an affirmative act of disposal. Thus, they argue the initial spilling of solvents onto the soil was "disposal," but any subsequent seeping of the chemicals was not.

The statute defines disposal broadly. *Disposal* means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters. If the General Assembly intended to insert a word into the definition of disposal to describe the passive migration of underground waste, we can think of many more likely candidates than *leaking*. For example, words such as *oozing, percolating, migrating,* or *seeping* would all provide a more exact description of that event. None of these was included in the definition.

The more likely reason for the inclusion of *leaking* in the definition is to address a situation in which waste was allowed to accidentally or negligently escape from its containment, such as a barrel or drum, or, as was the case here, from defective hoses or pumps.

Next, an examination of the other descriptive words in the same statute belies a passive migration interpretation of the term *leaking*. Six of the seven words in the statute, *discharge, deposit, injection, dumping, spilling,* and *placing,* all describe an affirmative act by one or more individuals. That is, someone must discharge, deposit, inject, dump, spill, or place waste into or on any land

or water. That leaves *leaking* as the only word that could arguably be subject to a passive interpretation. . . . The fact that six of the seven words in the statute are subject only to an active interpretation lends support to the argument that *leaking* should also be given a similarly active interpretation.

We conclude that the plain language of the statute does not answer the question of whether the legislature intended that unpermitted disposal be deemed a continuing offense. Therefore, we next consider the legislative purpose and policies underlying the statute.

The People argue that a passive migration interpretation of disposal is consistent with the legislative intent of ensuring the protection of the environment from the adverse effects of illegally disposed hazardous waste. On the other hand, respondents argue that a passive migration interpretation of disposal thwarts the General Assembly's intent to limit the use of criminal punishment to only recent violators of the act.

The hazardous waste management system in Colorado was created to "ensure protection of public health and safety and the environment." The criminal penalties contained in the statute play a role in this scheme by deterring and punishing the unpermitted transportation, storage, and disposal of hazardous waste. . . .

In summary, this case presents two competing policy interests. On the one hand, a passive migration interpretation of disposal would seem to more fully implement the legislative intent of ensuring protection of the environment. However, that interpretation thwarts the General Assembly's intent to limit the time during which criminal charges may be brought. Thus, we conclude that an analysis of the statute's purposes does not answer the question of whether the legislature intended that unpermitted disposal be deemed a continuing offense.

Holding

It is axiomatic that criminal law must be sufficiently clear such that a citizen will know what the law forbids. For this reason, ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant under the rule of lenity. In this case, the plain language of the statute and the apparent legislative policies underlying the statute . . . do not provide a clear answer to the question presented herein, namely, whether the legislature intended the passive migration of waste to constitute the crime of unpermitted "disposal" of hazardous waste. We therefore conclude that the respondents did not have adequate notice of the conduct the statute was intended to prohibit; specifically, the respondents did not have notice that their failure to remediate contaminated soil and prevent the passive migration of previously spilled waste would constitute a continuing crime such that they would be subject to the possibility of criminal charges twelve years after the last affirmative act of disposal. Based on the rule of lenity, we accordingly construe this ambiguity in favor of the respondents and hold that their prosecution is barred by the statute of limitations.

> . . . We cannot conclude that the legislature intended "disposal" to include the passive migration of previously leaked or spilled waste for the purposes of the criminal statute of limitations provision contained in section 25–15–308(4)(a). . . .

Dissenting, *Bender, J.*

In this case, the defendant company and one of its officers leaked and spilled thousands of pounds of poisonous chlorinated solvents, including Tetrachloro-ethene (PCE), Trichloroethene (TCE), Trichloroethane (TCA), and Methylene Chloride into the ground, creating an underground plume of deadly pollutants extending one mile long and two hundred feet wide, which continues to contaminate the soil and underground water table within a mile of the company's facility. Such enormous environmental damage took years to build up and longer for the government to detect. Aware of the nature of the environmental harm caused by the land disposal of hazardous wastes, the General Assembly passed broad and sweeping legislation aimed at preventing such future deadly pollution and punishing civilly and criminally those who failed to follow its regulatory regime, which mandates that those who dispose, store, or treat hazardous waste will be responsible for such waste until it no longer poses a threat to human health or the environment.

The majority, by its narrow construction of the term *disposal* to mean only the initial act of disposal and not the continued accumulation of the toxic pollutants into the environment that is still occurring today in 2003, cripples the broad legislative mandates of Colorado's Resource Conversation and Recovery Act (RCRA). . . .

I would hold that because the defendants' last "acts" of disposal continue to be perpetuated today, the defendants' conduct constitutes a continuing offense under RCRA. Because the defendants' disposal offense continued through the time of indictment and trial, and for that matter, continues today, their prosecution for illegally disposing of hazardous waste without a permit is not barred by the five-year statute of limitations.

The jury in this case found, by proof beyond a reasonable doubt, that the defendants knowingly and illegally leaked and spilled thousands of pounds of dangerous toxic chemicals without a permit. Although the defendants knew that a substantial amount of the toxic chemicals seeped into the ground, at no point did they make any effort to clean up, recover, or treat such spills. As a result, the toxins leaked through the soil and into the water table below. Subsequent testing revealed an underground pollution plume almost a mile long and hundreds of feet wide originating from the Thoro facility that contaminated a drinking water well used by a local restaurant

less than a mile away from the facility. An expert testified that a significant amount of the toxic chemicals spilled and leaked by the defendants currently remain in the soil underneath the Thoro site. Because there has been no cleanup or remediation of the soil, the pollution plume continues to migrate into the water table today.

In this case, for example, the EPA hydrologist testified that toxic chemicals in the soil at the Thoro facility—in concentration levels ten to a thousand times higher than levels considered safe for drinking water—were leaking into the water table and moving less than a foot a day through the underground water system. The pollutants emanating from Thoro took approximately twenty years to reach the drinking water well at the Arvada restaurant. Thus, even though the last "act" of disposal at the Thoro facility occurred in 1985, the EPA hydrologists testified that pollutants spilled and leaked at that time continue to flow unabated through the water table and into drinking water wells. . . . Individuals who drink water from these wells expose themselves to significantly increased risks of developing toxic conditions, cancer, and birth defects.

Under the federal statutory scheme, states replace the EPA as the primary enforcement and permitting authority. In exchange for federal financial assistance, states enact hazardous waste laws that are equivalent to the federal program. . . . However, if the EPA determines that the state is not administering its program in accordance with the federal RCRA program, it is required to withdraw authorization from the state program.

The Colorado Attorney General enforces the criminal provisions. It is a felony to knowingly dispose of any hazardous waste without a permit. A court may sentence anyone found guilty of knowingly disposing of hazardous waste without a permit to pay a fine of not more than fifty thousand dollars for each day of violation, or by imprisonment not to exceed four years, or by both such fine and imprisonment.

A jury found, beyond a reasonable doubt, that the defendants violated the criminal provisions of RCRA by knowingly disposing of hazardous waste without a permit. The record supports their conclusion that defendant Newman was aware and knew about the consequences of spilling and leaking hazardous waste and the danger to human health and the environment by allowing them to migrate underground. Based on his work experiences, education, and training, defendant Newman knew the technical process of proper disposal procedures and the strict requirements that RCRA imposed on those who disposed of hazardous waste so as to prevent the type of insidious migration that occurred here.

Defendant Newman was an integral part of Thoro's business during the time in which it continuously leaked and spilled tons of TCE, TCA, PCE, and Methyl Chloride onto the ground. In the early seventies, during college, Newman worked summers at Thoro. After graduating from college in 1974, Newman started full-time at Thoro. He started as a "terminal operator," which involved learning the business of handling the toxic chemicals. Specifically, Newman was responsible for pumping the chemicals from the railcar to the storage tank and then pumping them from the storage tank to the trucks. As a terminal operator, Newman received specific instructions from Dow about how to handle the toxic and dangerous chemicals. In its written handling instructions, Dow cautioned Thoro about "spill, leak and disposal procedures." The procedures indicted that for small spills, Thoro should mop up, wipe up, or soak up the liquid immediately. For large spills, Dow instructed Thoro employees to contain the liquid, to transfer it to a closed metal container, and to keep the contamination out of the water supply.

By 1978, Newman continued his role of terminal operator but also trained and assisted other employees as terminal operators. By late 1983, Newman was Vice-President of Thoro. . . . Newman's responsibilities were: (1) attending all school sessions, all classes, knowing all RCRA regulations and changes thereto; (2) monitoring the site location and checking field conditions and reports; (3) physically inspecting the site with inspectors and agencies; (4) checking mechanics of operation, maintenance, and conditioning as well as interfaces with chemical operators; and (5) insuring proper safety equipment and protection gear procurement, operation, and maintenance. Consistent with its continuing education policies, Thoro reported that Newman received extensive training. . . .

Given Newman's background, experiences, and training, the jury verdict established that he knew that his failure to remediate or clean up the spilled and leaked waste could result in criminal penalties. For over a decade after the passage of RCRA, Newman knew about the hazardous and dangerous nature of the toxic chemicals that he spilled and leaked into the ground. As the responsible and knowledgeable officer, he took no action to remediate the polluted soil or prevent dangerous toxins from migrating into underground water and reaching nearby drinking water wells. . . .

The disposal offense in this case is not simply an act of failing to file for a permit. Rather, the defendants set upon a course of continued noncompliance with RCRA by failing to properly dispose of toxic and dangerous chemicals. Once the defendants leaked and spilled tons of deadly pollutants into the ground, they had a continuing obligation under RCRA to see that the contamination was properly treated, remediated, or cleaned up in a manner that no longer posed a threat to human health and the environment. The defendants should not escape liability merely because they have failed to handle properly these chemicals for a considerable period of time and told no one of their acts for years.

The prevention of hazardous waste migrating through the environment so as to protect human health is at the core of RCRA's disposal procedures. The "cradle to grave" regime means that owners and operators of facilities that dispose of hazardous waste are responsible

for such waste until it is no longer hazardous. RCRA recognizes that when hazardous waste is allowed to migrate dangerously through the environment, those responsible for such migration will be held accountable for their continuing inaction until it stops. The nature of the defendants' actions and inactions—spilling and leaking tons of hazardous waste so that it would continually migrate through the water table unabated—is such that the General Assembly intended that they would be considered a continuing offense.

Questions for Discussion

1. What facts form the basis for Colorado's decision to prosecute Thoro and Newman for disposing of hazardous materials? What harm is caused by these chemicals?
2. Why do the defendants argue that their prosecution is barred by the statute of limitations?
3. An individual with hazardous waste on his or her property is required to obtain a permit to clean the site and then pay for the work. Why did Thoro not apply for a permit?
4. Did Thoro know about the damage that the chemicals posed to the environment when they first started handling toxic wastes? Were they hoping that the damage caused by these chemicals would remain undetected?
5. Summarize the decision of the Colorado Supreme Court. Does this decision limit or advance the protection of the environment?
6. How would you decide this case?

Cases and Comments

Resentencing of Richard Newman. Newman's conviction for the disposal of hazardous waste was barred by the statute of limitations. Nevertheless, the trial judge ruled that Newman remained liable for storing hazardous material and sentenced him to four years in prison, the maximum permitted for a single incident of felony storage or disposal. The judge stressed that Newman was aware of the leakage of hazardous waste material for a number of years and knowingly placed his neighbors at risk. Newman's sentence also reflected the fact that he failed to cooperate with governmental authorities or to display remorse. The judge stressed that Newman's punishment was designed to deter similar conduct by other individuals. The Colorado Supreme Court ruled that the sentence handed out by the trial judge was not an abuse of discretion given the millions of dollars of property damage caused by Newman's acts and the need to deter others tempted to place profits over safety. Is this sentence fair given that the Colorado Supreme Court ruled that a prosecution for disposal of hazardous waste was barred by the statute of limitations? See *People v. Newman,* 91 P.3d 369 (Col. 2004).

Occupational Health and Safety

For a deeper look at this topic, visit the study site.

In 1970, Congress responded to the increasingly high number of job-related deaths and injuries by passing the **Occupational Safety and Health Act** (OSHA). The act declared that workplace injuries and deaths were resulting in lost production and wages and in preventable medical expenses and disability compensation payments. The act also stated that every working person should be guaranteed safe and healthful working conditions.[3]

OSHA primarily relies on the civil process and financial penalties to insure compliance. A criminal misdemeanor carrying a fine of not more than $10,000 and a prison sentence of up to six months or both are provided in the case of a willful violation of the law that results in the death of an employee. A second conviction carries a fine of not more than $20,000 and a prison sentence of up to a year or both. False statements in any document submitted or required to be maintained under the act may also result in a fine of not more than $10,000 or imprisonment for not more than six months or both.[4]

OSHA refers cases of intentional, knowing, or reckless violations that result in death for prosecution by state authorities and, in recent years, to the EPA. The most recent data compiled by labor unions concluded that 5,840 workers died on the job in 2006. One study finds that corporations generally have not been criminally prosecuted either by the federal government or by the two states with their own forms of OSHA. OSHA initiated 1,798 workplace death investigations in the past twenty years (170,000 workers died during this period) and sent a total of 196 cases to

state or federal authorities for prosecution. This, in turn, led to 104 prosecutions, 81 convictions, and 16 jail sentences totaling thirty years.[5]

Securities Fraud

Stock market fraud emerged as a subject of intense public interest when it was announced, in June 2002, that domestic diva Martha Stewart was the subject of a criminal investigation for lying to investigators about the sale of stock.

On December 27, 2001, Martha Stewart sold 3,928 shares of stock in the biotech company ImClone, one day before the Federal Drug Administration (FDA) announced that it would not approve the company's new cancer drug, Erbitux. Stewart made roughly $228,000 by selling the stock. Following the FDA announcement, ImClone's stock rapidly fell in value, and had Stewart waited to sell, she would have lost an estimated $45,000. It later was revealed that Stewart lied to federal authorities when she denied having been informed by her stockbroker, Peter Bacanovic, and his assistant, Douglas Faneuil, that the head of ImClone, Sam Waksal, was selling his family's shares at a profit of $7.3 million after learning of the test results.

For a deeper look at this topic, visit the study site.

Martha Stewart and Peter Bacanovic were each sentenced to five months in prison and five months of home detention as a result of their convictions for lying to investigators. Waksal was sentenced to seven years and three months in prison and was ordered to pay more than $4 million in fines and taxes stemming from a variety of criminal offenses, including insider trading. Douglas Faneuil, in return for cooperating with authorities, was fined $2,000. Following Stewart's release from prison, she was confined to home detention on her $16 million estate while being permitted to receive her $900,000 salary and leave her home for up to forty-eight hours a week to work or run errands. Stewart reportedly devoted herself to running her company, Martha Stewart Living Omnimedia Inc.; writing a magazine column; and preparing for two television shows.

Critics contended that Stewart had been targeted because she was a woman and that the government had wasted valuable resources prosecuting her for the minor offense of lying to authorities about the fact that she had relied on inside information concerning the test results on ImClone's cancer drug. Why does the law punish individuals for buying or selling stocks based on information that is not available to the public at large?

Insider Trading

The stock market rather than banks is increasingly where Americans deposit and look to grow their savings. The average individual has twice as much money in the stock market as in banks. As a result, the federal government has become increasingly concerned with insuring that the stock market functions in a fair fashion and has aggressively brought criminal charges against individuals for stock market fraud.

A corporation that wants to raise money to build new plants, hire workers, or manufacture innovative products typically sells stocks to the public. Individuals purchase stock in hopes that as corporate profits rise, the stock will increase in value, and they eventually will be able to sell it at a substantial profit. This investment in stocks is an important source of money for businesses and provides individuals with the opportunity to invest their money and to save for a house or retirement. Corporate executives and corporate boards of directors possess a **fiduciary relationship** (a high duty of care) to safeguard and to protect the investments of stockholders.

The federal Securities and Exchange Commission (SEC) is charged with insuring that corporate officials comply with the requirements of the Securities Exchange Act of 1934 in the offering and selling of stocks. The act, for instance, requires corporations to provide accurate information on their economic performance in order to enable the public to make informed investment decisions. The SEC typically seeks civil law financial penalties against corporations that violate the law and refers allegations of fraud to the Department of Justice for prosecution. In 2002, Congress passed the **Sarbanes-Oxley Act**. This is a corporate criminal fraud statute that requires the heads of corporations to certify that their firms' financial reports are accurate. A violation of this act is punishable by up to twenty-five years in prison.[6]

In the past decade, the Department of Justice has focused its white-collar crime investigations on **insider trading** in violation of section 10b and Rule 10b-5 of the 1934 Act. The

enforcement of these provisions is intended to insure that the stock market functions in a fair and open fashion.

Let us return to the ImClone example. Imagine that you are an executive in ImClone and are informed that the company has invented a cure for cancer that has been approved by the federal government. You know that once the information is made public, everyone will be looking to buy ImClone stock and that this will mean that the price of the stock will increase. You tell your relatives the good news and ask them to buy the stock in their name before the announcement and then sell the stock and to divide the profits with you. When the information is announced, you and your grateful family find that you have made a substantial profit. You believe that this is a just reward for your dedication to the company. The government unfortunately indicts you (the tipper) and your relatives (the tippees) for insider trading. Why is this illegal? Because most people would not put their money in the stock market if a small number of people exploited information that was not available to the public at large to make a profit. This would reduce the money available to businesses and would harm the economy.

Several business law textbooks illustrate insider trading by *Diamond v. Oreamuno*. In this case, several executives of Management Assistance Inc., a computer firm, sold 56,500 shares of company stock for $28 a share at a time when they were aware that the firm's profits were rapidly falling. Then, they publicly announced the company's poor economic performance and the stock declined to $11 a share. The defendants, by selling the stock prior to their announcement, made $800,000 more than they would have earned had they waited to sell the stock. The New York court ruled that "there can be no justification for permitting officers and directors . . . to retain . . . profits which . . . they derived solely from exploiting information gained by virtue of their inside position as corporate officials."[7]

There are two theories of insider trading, both of which prohibit the use of information that is not available to the public to buy or sell a stock. Both theories impose criminal liability on **tippers** (individuals who transmit information) and **tippees** (individuals who receive the information). The **disclose or abstain doctrine** states that corporate officials must publicly reveal information to the public relating to the economic condition of a corporation before they buy or sell the company's stock. The **misappropriation doctrine** as we shall see in the next case, *United States v. Carpenter,* expands the law beyond individuals who work for a corporation and criminally punishes all individuals who take and use inside corporate information that is in the possession of their employer. An example is the U.S. Supreme Court case of *United States v. O'Hagan,* in which a lawyer was convicted of using information that his law firm obtained from a corporate client to make a profit of $4.3 million.[8]

Insider trading is difficult to establish. Investigators must look at who purchases or sells stock and determine whether these individuals relied on inside information in purchasing the securities. The prosecution also must prove a fraudulent intent. In other words, the government must establish that a defendant intentionally purchased or sold the stock knowing that the transaction was in violation of the law. What type of facts would you use to establish a case of insider trading by a corporate executive? Why were the defendants in *United States v. Carpenter* held liable for insider trading?

Did a journalist illegally provide investment advice?

United States v. Carpenter, *791 F.2D 1024 (2ND CIR. 1987),* Opinion by: Perkins, J.

Facts

Defendants Kenneth P. Felis and R. Foster Winans appeal from judgments of conviction for federal securities fraud in violation of section 10(b) of the 1934 Act and Rule 10b-5 mail fraud in violation and wire fraud . . . all in connection with certain securities trades conducted on the basis of material, nonpublic information regarding the subject of securities contained in certain articles to be published in the *Wall Street Journal*. Since March 1981, Winans was a *Wall Street Journal* reporter and one of the writers of the "Heard on the Street" column (the "Heard" column), a widely read and influential column in the *Journal*. Carpenter worked as a news clerk at the *Journal* from December 1981 through May 1983. Felis, who was a stockbroker at the brokerage house of Kidder Peabody, had been brought to that firm by another Kidder Peabody stockbroker, Peter Brant ("Brant"), Felis's longtime friend who later became the government's key witness in this case.

Since February 2, 1981, it was the practice of Dow Jones, the parent company of the *Wall Street Journal,* to distribute to all new employees "The Insider Story," a forty-page manual with seven pages devoted to the company's conflicts of interest policy. The district judge found that both Winans and Carpenter knew that company policy deemed all news material gleaned by an employee during the course of employment to be company property and that company policy required employees to treat nonpublic information learned on the job as confidential.

Notwithstanding company policy, Winans participated in a scheme with Brant and later Felis and Carpenter in which Winans agreed to provide the two stockbrokers (Brant and Felis) with securities-related information that was scheduled to appear in "Heard" columns; based on this advance information, the two brokers would buy or sell the subject securities. Carpenter, who was involved in a private, personal, nonbusiness relationship with Winans, served primarily as a messenger between the conspirators. Trading accounts were established in their names. . . . During 1983 and early 1984, defendants made prepublication trades on the basis of their advance knowledge of approximately twenty-seven *Wall Street Journal* "Heard" columns, although not all of those columns were written by Winans. Generally, Winans or Carpenter would inform Brant of the subject of an article the day before its scheduled publication. Winans usually made his calls to Brant from a pay phone and often used a fictitious name. The net profits from the scheme approached $690,000. The district court found that this scheme did not affect the subject matter or quality of Winans's columns, since "maintaining the journalistic purity of the column was actually consistent with the goals of the conspirators," given that the predictability of the columns' market impact depended in large part on the perceived quality and integrity of the columns. . . .

Issue

The fairness and integrity of conduct within the securities markets are a concern of utmost significance for the proper functioning of our securities laws. In broadly proscribing "deceptive" practices in connection with the purchase or sale of securities pursuant to section 10(b) of the Securities Exchange Act of 1934, Congress left to the courts the difficult task of interpreting legislatively defined but broadly stated principles insofar as they apply in particular cases. This case requires us to decide principally whether a newspaper reporter, a former newspaper clerk, and a stockholder, acting in concert, criminally violated federal securities laws by misappropriating material, nonpublic information in the form of the timing and content of the *Wall Street Journal*'s confidential schedule of columns of acknowledged influence in the securities market, in contravention of the established policy of the newspaper, for their own profit in connection with the purchase and sale of securities. It is clear that defendant Winans, as an employee of the *Wall Street Journal,* breached a duty of confidentiality to his employer by misappropriating from the *Journal* confidential prepublication information, regarding the timing and content of certain newspaper columns, about which he learned in the course of his employment. We are presented with the question of whether that unlawful conduct may serve as the predicate for the securities fraud charges herein.

Reasoning

Section 10(b), 15 U.S.C. § 78j(b), prohibits the use in connection with the "purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe. . . ."

Rule 10b-5, 17 C.F.R. § 240.10b-5, states:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud;
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The core of appellants' argument is . . . the misappropriation theory may be applied only where the information is misappropriated by corporate insiders or so-called quasi-insiders who owe to the corporation and its shareholders a fiduciary duty of abstention or disclosure. Thus, appellants would have us hold that it was not enough that Winans breached a duty of confidentiality to his employer, the *Wall Street Journal,* in misappropriating and trading on material nonpublic information; he would have to have breached a duty to the corporations or shareholders thereof whose stock appellants purchased or sold on the basis of that information.

We do not say that merely using information not available or accessible to others gives rise to a violation of Rule 10b-5. There are disparities in knowledge and the availability thereof at many levels of market functioning that the law does not presume to address. However, the critical issue is found in the district judge's careful distinction between "information" and "conduct." Whatever may be the legal significance of merely using one's privileged or unique position to obtain material, nonpublic information, here we address specifically whether an employee's use of such information in breach of a duty of confidentiality to an employer serves as an adequate predicate for a securities violation. Obviously, one may gain a

competitive advantage in the marketplace through conduct constituting skill, foresight, industry, and the like. But one may not gain such advantage by conduct constituting secreting, stealing, purloining, or otherwise misappropriating material, nonpublic information in breach of an employer-imposed fiduciary duty of confidentiality. Such conduct constitutes chicanery, not competition; foul play, not fair play. Indeed, underlying section 10(b) and the major securities laws generally is the fundamental promotion of "'the highest ethical standards' . . . in every facet of the securities industry." . . . We think the broad language and important objectives of section 10(b) and Rule 10b-5 render appellants' conduct herein unlawful. . . .

The information misappropriated here was the *Journal*'s own confidential schedule of forthcoming publications. It was the advance knowledge of the timing and content of these publications, upon which appellants, acting secretively, reasonably expected to and did realize profits in securities transactions. Since section 10(b) has been found to proscribe fraudulent trading by insiders or outsiders, such conduct constituted fraud and deceit, as it would had Winans stolen material, nonpublic information from traditional corporate insiders or quasi-insiders. The district court found that between October 1983 and the end of February 1984, twenty-seven "Heard" columns were leaked in advance. If an occasional investment plan faltered due to nonpublication of the anticipated corollary "Heard" column, the record nonetheless amply demonstrates that the majority of the securities traded resulted in profits reflecting the predictable price change due to the publication anticipated. This was true, for example, of trades in American Surgery Centers, Institutional Investors, and TIE/Communications, Inc., to mention just a few of the securities traded. In any event, a fraudulent scheme need not be foolproof to constitute a violation of Rule 10b-5. It is enough that appellants reasonably expected to and generally did reap profits by trading on the basis of material, nonpublic information misappropriated from the *Journal* by an employee who owed a duty of confidentiality to the *Journal*.

Nor is there any doubt that this "fraud and deceit" was perpetrated "upon any person" under section 10(b) and Rule 10b-5. It is sufficient that the fraud was committed upon Winans's employer. . . . Appellants Winans and Felis and Carpenter by their complicity perpetrated their fraud "upon" the *Wall Street Journal,* sullying its reputation and thereby defrauding it "as surely as if they took [its] money."

As to the "in connection with" standard, the use of the misappropriated information for the financial benefit of the defendants and to the financial detriment of those investors with whom appellants traded supports the conclusion that appellants' fraud was "in connection with" the purchase or sale of securities under section 10(b) and Rule 10b-5. We can deduce reasonably that those who purchased or sold securities without the misappropriated information would not have purchased or sold, at least at the transaction prices, had they had the benefit of that information. . . . Further, investors are endangered equally by fraud by noninside misappropriators as by fraud by insiders.

Appellants argue that it is anomalous to hold an employee liable for acts that his employer could lawfully commit. . . . In the present case, the *Wall Street Journal* or its parent, Dow Jones Company, might perhaps lawfully disregard its own confidentiality policy by trading in the stock of companies to be discussed in forthcoming articles. But a reputable newspaper, even if it could lawfully do so, would be unlikely to undermine its own valued asset, its reputation, which it surely would do by trading on the basis of its knowledge of forthcoming publications. Although the employer may perhaps lawfully destroy its own reputation, its employees should be and are barred from destroying their employer's reputation by misappropriating their employer's informational property. Appellants' argument that this distinction would be unfair to employees illogically casts the thief and the victim in the same shoes. . . . Here, appellants, constrained by the employer's confidentiality policy, could not lawfully trade by fraudulently violating that policy, even if the *Journal,* the employer imposing the policy, might not be said to defraud itself should it make its own trades.

Holding

Thus, because of his duty of confidentiality to the *Journal,* defendant Winans—and Felis and Carpenter, who knowingly participated with him—had a corollary duty, which they breached, under section 10(b) and Rule 10b-5, to abstain from trading in securities on the basis of the misappropriated information or to do so only upon making adequate disclosure to those with whom they traded.

Questions for Discussion

1. How could Winans violate the law when he did not work for the corporations whose stock he advised Brant and Felis to buy or sell?
2. Winans's columns contained data concerning the economic performance of companies that was available to any sophisticated member of the public who was skilled at corporate analysis. Is this insider information and trading?
3. Explain how the defendants benefited by investing in companies before the publication of Winans's columns.
4. Is it significant that Winans was never certain that a column would appear in a forthcoming issue of the *Wall Street Journal?*
5. Could the *Wall Street Journal* have traded in these securities without violating the law? What about a private individual who did not work for the *Wall Street Journal* who based his or her own analysis on the same information that was provided by Winans to Brant and Felis?

Mail and Wire Fraud

The U.S. government has relied on the mail and wire fraud statutes to prosecute a variety of corrupt schemes that are not specifically prohibited under federal laws. These prosecutions range from fraudulent misrepresentations of the value of land and the quality of jewelry to offering and selling nonexistent merchandise. The common element in these schemes that permits the assertion of federal jurisdiction is the use of the U.S. mails or wires across state lines (phone, radio, television). The federal **mail fraud** statute reads as follows:[9]

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme . . . places in any . . . authorized depository for mail . . . any matter or thing whatever to be sent or delivered by the Postal Service, . . . or takes or receives therefrom, any such matter or thing, . . . shall be fined under this title or imprisoned not more than 20 years, or both. . . .

A conviction for mail fraud requires the prosecution to demonstrate:

- *Scheme.* Knowing participation in a scheme or artifice to defraud.
- *Falsehood.* Intentional false statement or promise.
- *Money or Property.* The intent to obtain money or property.
- *Reliance.* Statement or promise was of a kind that would reasonably influence a person to part with money or property.
- *Mail.* The mails were used for the purpose of executing the scheme. This includes private mail delivery services. The mail is required to be only incidental to an essential part of the criminal design.

The requirements of mail and **wire fraud** are similar with the exception that the wire communication must cross interstate or foreign boundaries.[10] A conspiracy to commit mail or wire fraud is also prohibited under federal statutes. A prosecutor under the conspiracy statute is required to demonstrate that the use of the mail or wires would naturally occur in the course of the scheme or that the use of the mail or wires was reasonably foreseeable, although not actually intended.[11]

The next case, *United States v. Nguyen,* is an example of mortgage fraud. As you read *Nguyen,* pay attention to why the Ninth Circuit Court of Appeals found that Myna was guilty of mail fraud.

Were the defendants guilty of a fraudulent home-buying scheme?

UNITED STATES v. NGUYEN, *504 F.3D 561 (5TH CIR. 2007), OPINION BY: PRADO, J.*

Issue

Defendants-appellants Myna Tran ("Myna") and Tam Nguyen ("Tam") appeal from final judgments of conviction for their involvement in a fraudulent home-buying scheme. Myna challenges her convictions on the grounds that the government presented insufficient evidence to support her convictions.

Facts

In 2002, Sean Nguyen ("Sean"), a mortgage broker for Century Mortgage, and Dai Quoc Nguyen ("Dai"), a sales representative for Re/Max, devised a scheme to take advantage of a loan program that mortgage lender Countrywide Home Loans ("Countrywide") offered to its customers. The loan program allowed customers to secure a "no income, no asset" verification loan, or "NINA" loan, in which a home loan applicant who had an outstanding credit rating and who planned to live in a purchased home could obtain a loan without documentation of his or her income or assets. Sean and Dai both pled guilty and testified at Myna and Tam's trial.

The government alleges that the scheme worked as follows: The defendants and co-conspirators would locate a single-family residence offered for sale in metropolitan Dallas, Texas. Sean would have an appraiser, Ghandi Morka ("Morka"), prepare an appraisal for the home, which would overstate its true value by $100,000 to $200,000. Other participants in the scheme would recruit a "straw buyer" with good credit to act as the buyer of the property, even though this person did not

intend to live in the house or pay back the loan. One of two mortgage companies, either Asia Financial or EZ Financial, prepared a loan application and residential purchase contract based on the personal information that the straw buyer provided. The mortgage company would then submit a loan application to Countrywide for processing under the NINA program. Countrywide's loan amount, based on the sales price, which was in turn based on a bogus appraisal, would be far in excess of the fair market value of the property. Countrywide would then disburse the amount of the loan to the seller. The seller would keep an amount equal to the equity in the house, and the "profit"—the excess money that the seller obtained because of the fraudulently high appraisal—would be distributed among the conspirators. The government presented evidence to show that Myna and Tam were involved in several parts of the scheme: The government claimed that Myna was involved in the sale of four properties, two of which were included in the indictment and two of which were not.

Myna, a mortgage broker for Ultima Real Estate Services, worked as the listing agent for a property at 6319 Fox Hunt Drive in Arlington, Texas. The original listing price for the property was $239,000. Sean told Myna that he could find a buyer for the Fox Hunt property if the seller, Ahn Nguyen ("Ahn"), would agree to have her house appraised at a higher value. Morka prepared an appraisal report stating that the property was worth $440,000. Myna told Ahn that the house would now be selling for that price.

Countrywide provided the loan for the transaction and wired the money to American Title Company, which then paid off Ahn's prior mortgages and wired the remainder to Ahn's personal BankOne bank account. After the closing, on October 3, 2002, Myna called Ahn and told Ahn to meet her at the BankOne branch below Myna's office in Arlington, Texas. Myna, Sean, and several other people were waiting for Ahn when she arrived at BankOne. Ahn withdrew approximately $186,000 in cashier's checks from her account and distributed the checks to those involved in the scheme. She kept the remaining money, which represented her equity in the Fox Hunt property. According to the government, Myna expected to make between $10,000 and $30,000 from the deal in addition to her normal real estate commission.

Myna allegedly played a different role with respect to the fraudulent transaction involving 6727 Silvercrest Drive. In this instance, Myna let Sean use her personal bank account for the Silvercrest transaction in exchange for a fee. Sean had the seller of the house sign a document that authorized the title company to wire approximately $129,000 to Myna's bank account. After the closing for the sale of the Silvercrest property, an escrow officer for the title company duly wired the money into Myna's account. Myna gave Sean a cashier's check for the amount wired to her account, and Sean paid Myna between $5,000 and $10,000 in cash.

Myna was involved in the sale of two other properties that the government did not include in its indictment. Myna acted as the seller's agent for the sale of properties at 319 Tabor Drive and 2723 Rolling Hills Lane, a role similar to the one that she played in the sale of the Fox Hunt property. . . . Tam's role in the scheme was to find straw buyers to participate in the fraudulent real estate transactions. Sean testified that he allowed Tam to decide how much money to give to each straw buyer, directing Tam to split the remainder of the "profit" with Sean. The government tried Myna and Tam in the same trial, along with one other defendant, Xuyen Thi-Kim Nguyen.

A jury convicted Myna of one count of conspiracy to commit mail fraud and wire fraud and to engage in illegal monetary transactions, five counts of wire fraud, one count of mail fraud, and two counts of money laundering. The district court sentenced Myna to thirty months' imprisonment and ordered her to pay restitution in the amount of $899,809.63. The jury also convicted Tam of one count of conspiracy to commit mail fraud and wire fraud and to engage in illegal monetary transactions, twelve counts of wire fraud, two counts of mail fraud, and three counts of money laundering. The district court sentenced Tam to sixty months' imprisonment for the conspiracy count and seventy-eight months on the other counts, with the sentences to run concurrently. The district court also ordered Tam to pay restitution in the amount of $966,118.53. Both defendants appealed their convictions.

Reasoning

Mail and wire fraud are specific intent crimes that require the government to prove that a defendant knew the scheme involved false representations. Myna claims that the government failed to provide sufficient evidence on this point. If the government did not show that Myna knew of false representations to support the mail and wire fraud convictions, Myna continues, then the conspiracy and money laundering convictions fail as well because they depend on Myna's involvement in a fraud. Myna also argues that the government did not present sufficient evidence to convict her of the counts relating to the Silvercrest property. . . . Myna's arguments fail, however, because at trial, the government presented sufficient evidence to demonstrate that (1) Myna was aware that the transactions involved at least three false representations and that (2) Myna had knowledge of the illegality of the Silvercrest transaction.

Myna maintains that the government did not produce sufficient evidence to prove beyond a reasonable doubt that she knew that the straw buyers sought loan amounts for the Fox Hunt and Silvercrest properties that were based on fraudulently inflated appraisals. Instead, she argues that the government's evidence, at best, shows that she knew that the sales price exceeded the market

value of the homes but that a representation of a home's sales price is not necessarily a representation as to its value.

However, a rational jury could find beyond a reasonable doubt that Myna knew that the sales prices and loan amounts for the Fox Hunt and Silvercrest properties stemmed from false appraisals. Sean testified that he agreed to help sell the Fox Hunt home on "the condition that, you know, we bump up the appraisal to a higher amount." Myna was not oblivious to the appraisal process, for she knew that an appraiser was coming to the Fox Hunt property and asked Ahn, the seller, to leave a key for the appraiser. This new appraisal nearly doubled the value of the house. Myna then convinced Ahn to raise the sales price from $239,000 to $440,000, a figure that matched exactly the bogus appraisal value. Further, when Sean expressed a concern that Ahn would keep the excess money, Myna assured Sean that she was friends with Ahn and that Ahn would keep only her true equity, not the excess proceeds. Myna accompanied Ahn to the BankOne branch when Ahn withdrew the excess proceeds and wrote cashier's checks for a number of other people. A reasonable jury could conclude that if the price had increased for legitimate market reasons, presumably, Ahn would not have written these checks to other people; she would have pocketed the excess value. Given the totality of the evidence, therefore, a jury could conclude that Myna knew Sean relied on false appraisals to increase the sales prices of both properties. Thus, the government presented sufficient evidence regarding these false representations.

Myna argues that the evidence does not support the allegations in the indictment that referred to "fraudulent mortgage loan applications submitted by straw purchasers." . . . The government, Myna argues, cannot prove fraud on the basis of the Uniform Loan Application (URLA) forms because those forms make only true statements about the loan and sales prices. Myna's claims are without merit. . . . The URLA form for the Fox Hunt property can serve as a basis for fraud because the purchase price listed on the form was derived from the fraudulently inflated appraisal. As to the Silvercrest property, the purchase price on the URLA form was left blank, but the Silvercrest URLA form seeks a loan amount of $318,750, even though the seller originally sought $184,900 for the property. Thus, a jury could reasonably infer that the inflated loan amount was a reflection of the bogus appraisal. The jury also could conclude that Myna was aware of the loan application. As an experienced mortgage broker, Myna almost certainly would have known that Countrywide would need a loan application from the buyer before giving a several hundred thousand dollar home loan. . . . The mail fraud statute does not merely require that a scheme to defraud cause a mailing; it also requires that the mailing that is caused be a part of the execution of the fraud or be incident to an essential part of the scheme.

Here, the URLA forms were part of the execution of a fraud and therefore can be the basis of mail and wire fraud, notwithstanding the fact that the forms contained true statements of the purchase prices or loan amounts. Thus, the government presented sufficient evidence for a jury to conclude that Myna knew that the straw buyers were submitting fraudulent loan applications in furtherance of the scheme.

Myna claims that the government presented insufficient evidence to show that she knew that the buyers did not intend to move into the houses, which was a requirement of the NINA loans. Sean testified, however, that both Myna and Ahn, the seller of the Fox Hunt property, knew the details of the transaction. Specifically, Sean stated that the goal of the transaction was to "appraise to a higher value and make a profit." A reasonable jury could infer that if Myna knew of the details of the plan and wanted to "make a profit," then she also knew that Sean never intended to find a legitimate buyer at the higher price. Myna fails to explain why Sean's extensive testimony and the other evidence regarding the fraud was insufficient to demonstrate that she knew that the straw buyers never planned to live in the houses.

Myna contends that the government failed to demonstrate that she knew that the Silvercrest transaction was illegal. Specifically, Myna claims that she did not play any role in selling the Silvercrest property, instead simply receiving the proceeds from the transaction in her account and writing cashier's checks to various people to disburse the money. The record demonstrates, however, that Myna knew that the fraudulent scheme Sean used for the Silvercrest property was the same one he used in the earlier Fox Hunt sale. In particular, Sean testified that Myna was willing to receive the money and distribute it to the others involved in the scheme, much like Ahn had done for the Fox Hunt deal. In response to whether Myna was aware that the wire transfer to her "was another one of those housing deals," Sean testified. "By this time Myna knew. . . . She agreed to do it with the condition that I have to compensate her." Additionally, Myna knew how the illegal scheme worked in the Fox Hunt transaction, and the Fox Hunt and Silvercrest deals involved the same basic fraudulent operation. Based on this evidence, taken in the light most favorable to the government, a jury could conclude beyond a reasonable doubt that Myna knew that the Silvercrest transaction was illegal.

Holding

The evidence supports convictions for mail fraud. A jury could reasonably find that Myna knew that the sales prices and loan amounts for the Fox Hunt and Silvercrest properties stemmed from false appraisals submitted on behalf of "straw buyers" who had no intention of moving into the homes. The mailing of the loan application forms was an important part of the scheme to obtain excess funds.

Questions for Discussion

1. Describe the fraudulent home-buying scheme involved in *Nguyen*.
2. What was Myna's role in executing the scheme?
3. Why did the Fifth Circuit Court of Appeals hold that Myna was guilty of mail fraud?
4. As a defense attorney, what arguments would you make to persuade the court that Myna was innocent of mail fraud?

The next case, *United States v. Duff,* raises interesting issues of the interpretation of fraud under the mail fraud statute. It also clarifies whether the use of the mails or wires must be a central part of a scheme to defraud or may be a minor aspect of the criminal plan.

Did the defendants use the mails to commit mail fraud against the City of Chicago?

UNITED STATES v. DUFF, *336 F. SUPP. 2D 852 (N.D. ILL. 2004),* OPINION BY: BUCKLO, J.

Facts

Defendants James M. Duff, William E. Stratton, Patricia Green Duff, and Terrence Dolan move to dismiss the indictment.

The indictment charges defendants with . . . mail fraud . . . money laundering. . . . The indictment charges that defendants conspired among themselves and with others, both named and unnamed, to defraud the City of Chicago (the City) by falsely representing that certain entities, which were in fact owned and managed by Mr. Duff, were qualified as Minority-Owned Businesses (MBEs) or Women-Owned Businesses (WBEs) under . . . the amended Municipal Code of the City of Chicago. The Municipal Code's provisions are designed to provide set-asides for MBEs and WBEs in connection with large contracts let by the City for competitive bidding. In order to qualify for the set-asides, businesses must be at least 51% owned and controlled by one or more minorities or women.

The charging allegations are numerous and specific. Using the charges that involve just two of the Duff businesses as examples, the allegations may be summarized as follows. Windy City Maintenance, Inc. was certified as a WBE in 1991 on the basis of a sworn affidavit and certain other statements made by Patricia Green Duff to the effect that she was the real owner and controlled the operations of Windy City Maintenance. In fact, Ms. Green Duff, who is the mother of James M. Duff, was not the real owner of the business; it was owned and controlled by Mr. Duff. In 1994, Remedial Environmental Manpower, Inc. (REM), was qualified by the City as an MBE on the basis of a sworn affidavit and other statements of Mr. Stratton, an African American, who claimed that he was the real owner and controlled the operations of REM. In fact, Mr. Duff, not Mr. Stratton, owned and controlled REM. Similar allegations are made with respect to the other Duff-owned businesses.

The indictment charges the pattern of deceit did not end with the initial qualification of the entities; ongoing compliance requirements of the Municipal Code were flouted by similar deceptions made in subsequent years. As a result, the entities specifically mentioned above, together with other Duff-owned and -controlled businesses, obtained direct contracts and subcontracts worth more than $100 million and generated payments and distributions for the benefit of the named defendants and other relatives and associates of Mr. Duff aggregating more than $9 million.

Reasoning

Mail fraud is established as a federal crime by 18 U.S.C. § 1341. In the present case, the defendants' conduct deprived the City of the power to control how its money should be spent. Under the minority set-asides established in the Ordinance, the City made it unmistakably clear how it wanted its money spent, and defendants' conduct, if true, thwarted the City's legislative intent. By allegedly falsely representing the identity of owners and management in Duff family businesses, defendants are accused of causing over $100 million in City money to go to businesses that were neither MBEs nor WBEs.

Defendants also argue that the City suffered no actual loss, because the indictment does not charge that the Duff-owned companies gave less than full value in providing their services. . . . The assertion that the businesses owned and controlled by Mr. Duff performed satisfactorily under the contracts obtained by them through fraud is not a defense . . . using innocent third parties to effect a scheme to defraud also does not shield the perpetrator from criminal penalties. . . .

Issue

Defendants ask that the mail fraud counts be dismissed on the ground that all of the mailings of checks from the City described in those counts were to third-party general contractors such as Waste Management and that

in no instance were the mails used to further a scheme; and that the mailings would have occurred regardless of defendants' conduct.

Holding

The defendants' alleged scheme was a continuing one that lasted through the 1990s. The core element of the scheme was the masquerade of Duff-owned and -controlled businesses as MBEs and WBEs, which allowed those entities to gain, fraudulently, large fees as subcontractors of the general contractors to which the checks were mailed. Under § 1341, a mailing will be considered in furtherance of a scheme to defraud if it is incidental to an essential part of the scheme. If the City had not mailed checks to the prime contractors, defendants' entities would have gained nothing from their alleged fraudulently obtained status as qualified subcontractors. . . .

Questions for Discussion

1. Explain how Chicago was the victim of the mail fraud of property or money. Did Chicago receive what it paid for?
2. What about the defendants' argument that the mails were not used to further the alleged fraud?
3. James Duff received a ten-year prison sentence. William Stratton, an African American appointed by Duff to head Remedial Environmental Manpower, received six years in prison. Duff was also ordered to pay more than $22 million in fines. Patricia Green Duff was evaluated as unfit to stand trial. Prosecutors had asked for a sentence of twenty-five years for James Duff. Defense lawyers characterized Duff as a loving husband and father of six, and Duff promised that he would "never be in court under these situations again." Were these sentences too lenient or too harsh? Can you think of a creative punishment for Duff that would have both punished him and assisted society? Duff's conviction and sentence later were affirmed by the Seventh Circuit Court of Appeals. See *United States v. Leahy,* 464 F.3d 773 (7th Cir. 2006). You may be interested in comparing *Duff* to a case involving a sports agent and college athletes in which the Seventh Circuit held that the fraudulent scheme did not fall within the mail fraud statute. See *United States v. Walters,* 997 F.2d 1219 (7th Cir. 1993).

See more cases on the study site: United States v. Brown, *www.sagepub.com/lippmanccl2e*

The Travel Act

The **Travel Act** of 1961 was intended to assist state and local governments to combat organized crime. The Travel Act, 18 U.S.C. § 1952, authorizes the federal government to prosecute what are ordinarily considered the state criminal offenses of gambling, the illegal shipment and sale of alcohol and controlled substances, extortion, bribery, arson, prostitution, and money laundering. Federal jurisdiction is based on the fact that the crimes have been committed following travel in interstate or foreign commerce or through the use of the U.S. mails or any other facility in interstate or foreign commerce.

In *United States v. Jenkins,* the Second Circuit Court of Appeals stated that a conviction under the Travel Act requires (1) travel or the use of the mails or some other facility (e.g., wires) in interstate or foreign commerce, (2) with the intent to commit a criminal offense listed in the Travel Act or crime of violence or to distribute the proceeds of an illegal activity, and (3) the commission of a crime or attempt to commit a crime.[12] Performing or attempting to perform an act of violence is punishable by not more than twenty years in prison or a fine or both. Other offenses are punishable by not more than five years in prison or a fine or both.

In *United States v. Goodman,* Goodman promoted records by contacting and persuading radio stations to place records from the companies he represented on their "playlists." Goodman, however, went beyond mere persuasion and was determined to have illegally paid as much as $182,615 a year in cash through the mails to program directors and disc jockeys in return for placing records on their playlists. Goodman was convicted under the Travel Act of the use of interstate mail to commit bribery. The federal appellate court rejected the argument that the payments occurred after the records were added to the playlists and that the payments therefore did not constitute a bribe to induce station managers and disc jockeys to play specific records. The court noted that the receipt of the mailed money was intended to both "reward a past transgression and to influence or promote a future one."[13]

Goodman was also convicted under 47 U.S.C. § 508, the Payola Act, which prohibits the payment of money to radio station employees for the inclusion of material as part of a program unless the payment is disclosed to the recipient's employer. The federal appellate court ruled that the offense is complete upon the payment of money and that the records need not actually be played.

Health Care Fraud

Roughly one-fifth of the federal budget is devoted to health care, most of which involves reimbursing doctors and health care workers for services provided under various federal and state programs to the elderly, children, the physically and mentally challenged, and economically disadvantaged individuals. The difficulty of administering programs of this size and complexity creates an opportunity for doctors and other health care providers to submit fraudulent claims for the reimbursement of services that, in fact, were never provided or to seek payment for unnecessary procedures. In 1996, Congress acted to prevent this type of fraud when it adopted a statute on health care fraud that punishes individuals who knowingly and willfully execute or attempt to execute a scheme or artifice

> to defraud any health care benefit program; or to obtain by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of any health care benefit program.[14]

Health care fraud is punishable by a fine and imprisonment of up to ten years or both. Fraudulent acts that cause serious injury are punishable by a term of imprisonment of up to twenty years, while fraudulent acts that result in death are punishable by up to life in prison.

In *United States v. Baldwin,* the defendants were convicted of submitting a false claim of $275,000 for four dental chairs.[15] The health care fraud statute was interpreted to cover individuals outside the medical profession in *United States v. Lucien.* The defendants paid individuals to cause collisions with other vehicles and to claim that they suffered serious injuries. The defendants referred these alleged "victims" to various medical clinics in return for a fee. The clinics sought reimbursement from New York for medical procedures that, in fact, had not been provided. The "victims" then sued the drivers of the other vehicles in hopes of obtaining a settlement from the drivers' insurance companies.[16]

The type of extreme and grossly fraudulent abuse of the health care system that can take place is illustrated by *United States v. Miles*.[17]

Affiliated Professional Home Health (APRO) was formed in 1993 in Houston, Texas, by Carrie Hamilton, Alice Miles, and Richard Miles. Richard Miles, a vice principal of a Houston-area high school, was married to Alice Miles, a registered nurse, and is the brother of both Hamilton, also a registered nurse, and Harold Miles, an APRO employee. When APRO obtained certification from the Texas Department of Health and a Medicare provider number, the company began to treat Medicare-covered patients and obtain reimbursement for in-home visits to such patients.

In this case, the government presented evidence that the defendants, through APRO, submitted cost reports that grossly inflated expenses for items ranging from mileage to employee salaries. For example, Hamilton was reimbursed for a whopping 282,000 travel miles from 1994 to 1996, a period when she also frequently visited Louisiana casinos. Alice Miles, another avid gambler, was reimbursed for 150,000 travel miles over three years, while her husband, whose primary job kept him occupied for most of the work day, was reimbursed for 180,000 miles over four years.

APRO also obtained reimbursement for costs that included personal expenses, such as renovations to the Hamiltons' home, renovations to the Miles's parents' residence, and various home appliances. Eventually, the amount of money coming in to APRO for fake charges became so large that in order to sustain the claimed level of expenses over the next year—so that APRO would not have to return overpayments to the federal government—the APRO principals began to use a variety of other methods to bilk Medicare out of taxpayer funds. These methods included their writing large-dollar checks to employees for "expenses" or "back pay" and then requiring the employees to cash the checks and hand the funds back to the APRO principals. Appellants billed expenses to Medicare for two or three times the actual cost incurred. At times, they engaged in more intricate schemes involving the splitting of large reimbursement checks into smaller cashier's checks that were then deposited into the APRO principals' bank accounts or used for personal expenses. On one occasion, Hamilton split an APRO check into cash and three cashier's checks at one bank. She deposited two of the cashier's checks into her own account at another bank and used a portion of the funds to obtain a fourth cashier's check to purchase a new Ford Mustang convertible. The third cashier's check from the original bank was cashed at the Star Casino.

Money Laundering

Individuals involved in criminal fraud or drug or vice transactions confront the problem of accounting for their income. These individuals may want to live a high-profile lifestyle and buy a house or automobile that they could not afford based on the income reported on their tax forms. An obvious gap between lifestyle and income may attract the attention of the Internal Revenue Service or law enforcement. How can individuals explain their ability to purchase a million-dollar house when they report an income of only $30,000 a year? Where did the cash come from that they used to buy the house? Bank regulations require that deposits of more than $10,000 must be reported by the bank to the federal government. How can individuals explain to government authorities the source of the $50,000 that they deposit in a bank?

The solution is **money laundering**. This involves creating some false source of income that accounts for the money used to buy a house, purchase a car, or open a bank account. This typically involves schemes such as paying the owner of a business in cash to list a drug dealer as an employee of the individual's construction business. In other instances, individuals involved in criminal activity may claim that their income is derived from a lawful business such as a restaurant. Money laundering statutes are intended to combat the "washing" of money by declaring that it is criminal to use or transfer illegally obtained money or property. This is punishable by a fine of up to $500,000 and imprisonment for up to twenty years.

Money laundering includes the following elements:

- The defendant engaged or attempted to engage in a monetary transaction.
- The defendant knew the transaction involved funds or property derived from one or more of a long list of criminal activities listed in the statute.
- The transaction was intended to conceal or disguise the source of the money or property; or
- The transaction was intended to promote the carrying on of a specified unlawful activity.
- The money constituted the "proceeds" or "profit" from an unlawful activity.[18]

In *United States v. Johnson,* the defendant generated millions of dollars from a fraudulent scheme involving Mexican currency. The Tenth Circuit Court of Appeals ruled that the use of these funds to purchase an expensive home and a Mercedes violated the money laundering statute in that these purchases furthered the defendant's continued illegal activities by providing him with a legitimacy that he used to impress, attract, and ultimately victimize additional investors.[19]

In *United States v. Carucci,* a real estate agent was acquitted who assisted a well-known organized crime figure purchase several homes. The federal appellate court agreed with the government prosecutors that the organized crime figure was unable to account for the source of the money that he used to buy real estate. The court, however, ruled that the government failed to clearly establish that these funds were derived from an illegal activity, such as illegal gambling, extortion, narcotics, or loan sharking.[20]

The next case in the text, *United States v. Blowe,* illustrates a money laundering scheme. Can you explain in a clear and straightforward fashion why Blowe was convicted of money laundering?

Was Blowe guilty of money laundering?

United States v. Blowe, *268 Fed. App'x 791 (11th Cir. 2008), Per Curiam*

Facts

A federal grand jury issued an . . . indictment against eight defendants, including Blowe and Haynes, arising out of the operation of an alleged criminal organization, referred to in the indictment as the Black Mafia Family (BMF). Count One charged Blowe, Haynes, and other codefendants with conspiracy to commit money laundering by transporting or aiding and abetting the transportation of drug proceeds. Count Two charged Blowe, Haynes, and other codefendants with conspiracy to distribute five kilograms or more of cocaine hydrochloride. Count Three charged Blowe and other codefendants with money laundering arising from the transportation

of approximately $66,850, representing the proceeds of an unlawful activity. . . . Count Six charged Haynes and another codefendant with money laundering.

At trial, the government called Danny Anderson, a task force agent for the Drug Enforcement Agency (DEA), who testified that the BMF was in the business of trafficking cocaine hydrochloride and used the proceeds of this business to live a luxurious lifestyle. According to Anderson's testimony, the BMF advertised itself as a rap record label with its own magazine, but Anderson was unaware of any concerts or legitimate business activities of the BMF. The main targets of his Orlando-based investigation of the BMF were William Charles Marshall, Doren Fiddler, and Mark Whaley. Marshall was the Chief Financial Officer (CFO) of BMF. Whaley leased high-end vehicles to BMF members from Marshall's car rental business. Haynes acted as security and as an assistant for Marshall. On June 17, 2005, after conducting surveillance and coordinating with the Columbia County Sheriff's Office, law enforcement agents pulled over Blowe and Fiddler as they were driving north from Orlando to Atlanta and discovered a large amount of currency hidden in the vehicle. Anderson testified that BMF members always put their vehicles, properties, accounts, and telephones in other people's names to avoid detection by law enforcement.

The government called Marshall as a witness, and he testified that at the time of trial, he was incarcerated for distributing cocaine and for money laundering. He handled the majority of the finances for the BMF, and the record label was a front to allow the BMF to hide and distribute the cocaine proceeds. He listed several individuals who worked for him, including Blowe. Fiddler worked directly for Marshall as a manager responsible for distributing cocaine out of Orlando, and Whaley was responsible for the high-end luxury cars distributed to various BMF members around the country.

Marshall testified that he hired Blowe to handle the travel aspects of the BMF's operation, but her role eventually grew until she was performing all of the BMF's clerical and administrative work, such as paying the bills of BMF members and dropping off drug proceeds for Marshall. Blowe took initiative and improved the business by changing the previous BMF spreadsheet and depositing drug proceeds into multiple accounts—using her own personal bank accounts and the account of a newly created business—in order to avoid detection by law enforcement. In May 2005, Blowe offered to make a trip to pick up drug proceeds. The following month, Marshall sent Blowe to Orlando to drive Fiddler and approximately $66,000 back to Atlanta. Blowe told Marshall that she had been stopped by law enforcement and that they found the money in the car. According to Marshall, Blowe knew the money involved was drug proceeds, because he had conversations with Blowe specifically about drugs in relation to her administrative work, and on one occasion in early 2004, Blowe witnessed Marshall sell cocaine. Further, on numerous occasions, Blowe knowingly rented certain trucks with hidden compartments to allow for the transportation of the drug proceeds without detection, and Marshall provided Blowe with a cover story to tell law enforcement if they were ever caught transporting large amounts of money.

Marshall testified that Haynes's primary role was to act as security for Marshall, but he also took care of "just about everything" as Marshall's right-hand man. Haynes worked for Marshall for approximately two years, lived with Marshall in his various homes, and spoke with Marshall nearly every day during that period.

The government then called Fiddler as a witness. He had already pled guilty in this case but was awaiting sentencing. Fiddler testified that he deposited drug proceeds into Blowe's accounts, and Blowe was the administrator of BMF who took care of all of the bills. In June 2005, Blowe was sent to Orlando to drive Fiddler and a large sum of money back to Atlanta because Fiddler was a bad driver and fell asleep on the road. As Blowe drove to Atlanta with Fiddler and $60,000—which Fiddler had hidden in a compartment in the rental vehicle—the police pulled the car over and confiscated the money. Fiddler testified that Blowe did not know that the money was in the truck, and she had previously told him that she did not want to know what was in the car.

Blowe testified that her duties for Marshall included organizing and paying bills for Marshall and his friends, paying Marshall's house payments, and making travel arrangements. Marshall told her that he was dealing with cars, but she did not have an understanding of his business. She denied knowing that any money was concealed in the car when she was stopped in June 2005. Marshall never asked her to carry cocaine, she never transported money for him, she never heard him use the word cocaine, and she never saw cocaine around Marshall or Fiddler.

The jury returned a guilty verdict against Blowe for conspiring to commit money laundering, conspiring to distribute cocaine, and money laundering. The jury found Haynes guilty of conspiring to commit money laundering, conspiring to distribute cocaine, and money laundering. . . . The district court entered judgment against Blowe and sentenced her to 120 months of imprisonment. The district court entered a judgment against Haynes and sentenced him to 60 months of imprisonment. These appeals followed.

Issue

Blowe contends that the evidence does not support her conviction for conspiracy to distribute cocaine or for money laundering.

Reasoning

To obtain a conviction for conspiracy to distribute cocaine, the evidence must establish beyond a reasonable doubt that (1) a conspiracy existed, (2) the defendant knew of

the conspiracy, and (3) the defendant voluntarily joined the conspiracy. Similarly, to obtain a conviction for conspiracy to commit money laundering, the government must prove that there was an agreement to launder the proceeds of an unlawful activity and that the defendant voluntarily participated in that agreement. To obtain a conviction for money laundering, the government must prove that the defendant knowingly conducted a financial transaction with proceeds of an unlawful activity either with the intent to promote the carrying on of the unlawful activity (promotion) or with the knowledge that the transaction is designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds (concealment).

In this case, Blowe argues that she was unaware of the BMF drug and money laundering conspiracies, and therefore, she could not have voluntarily joined them. However, evidence was presented at trial that she knew that BMF was distributing cocaine and laundering the proceeds and that she participated by making travel arrangements, paying the bills for BMF members, improving the financial efficiency and security of the business, renting vehicles with hidden compartments, and transporting drug proceeds. Drawing all reasonable inferences and credibility choices in favor of the government, we conclude that there was sufficient evidence upon which the jury could have found that Blowe was aware of the nature of BMF's cocaine and money laundering operations and that she voluntarily participated in the conspiracies. Furthermore, there was sufficient evidence for the jury to conclude that Blowe was transporting over $66,000 with the intent to promote BMF's unlawful enterprise. Accordingly, the evidence presented at trial was sufficient to support Blowe's convictions for conspiracy to distribute cocaine, conspiracy to commit money laundering, and money laundering. There also was sufficient evidence to establish Haynes's actual knowledge of BMF's operation, as Haynes testified that he observed cocaine on two occasions and that he heard BMF members discussing cocaine. Therefore, the district court did not reversibly err by instructing the jury on the theory of deliberate ignorance.

Holding

For the foregoing reasons, we affirm Blowe's and Haynes's convictions.

Questions for Discussion

1. What are the elements of money laundering?
2. Why was Blowe convicted of money laundering?
3. Explain the reasons for making money laundering a crime.

Antitrust Violations

The **Sherman (Antitrust) Act of 1890** is intended to insure a free and competitive business marketplace. The Sherman Act, according to former Supreme Court Judge Hugo Black, is designed to be a "comprehensive charter of economic liberty aimed at preserving free unfettered competition as the rule of trade." Imagine if every bar and restaurant in a college town agreed to sell beer at an inflated price rather than compete with one another for the business of students. The theory behind the Sherman Act, as explained by Justice Black, is that economic competition results in low prices and high quality and promotes self-reliance and democratic values. Can you explain why free competition leads to these benefits?[21]

The criminal provisions of the Sherman Act state that any person "who shall make any contract or engage in any combination or conspiracy" to interfere with interstate commerce is guilty of a felony. A corporation shall be punished with a fine of $10,000,000 and an individual by a fine of $1,000,000 or by imprisonment not exceeding three years, or both.[22]

A conviction requires proof that two or more persons or organizations:

- Knowingly entered into a contract or formed a combination or conspiracy.
- The combination or conspiracy produced or potentially produced an unreasonable restraint of interstate trade.

In *United States v. Azzarelli Construction Co. and John F. Azzarelli,* the defendant was the owner of a construction company who agreed with the owners of other construction businesses to rig the process of bidding on state contracts to insure that each firm would receive state contracts. One firm would be designated to receive a contract and would submit an unreasonably high bid

on the job. The competing firms would submit grossly inflated bids, insuring that the first firm would receive the contract. The firms that intentionally lost the job then would be compensated by receiving a kickback from the successful contractor. The court noted that this fraudulent practice interfered with interstate commerce by raising the cost of highway construction and resulted in less money being available to upgrade the highway system.[23]

Crime in the News

In December 2008, prominent New York investment broker Bernard L. Madoff called his sons into his office and announced that his business was a "big lie" and "basically a giant Ponzi scheme." Madoff sadly noted that there was "nothing left" and that he expected to "go to jail." He was arrested on December 11 and confessed to the FBI that he had looted investors of as much as $50 billion, making this the largest fraud in American history. Madoff's scheme was relatively unsophisticated. He would use the money provided by new investors to pay returns to old investors. This enabled Madoff to pay investors a consistent return of ten to fifteen percent a year. He was so successful that he could afford to turn investors away who lacked the "right background" and required most people who wanted to invest their money to provide at least $1 million. Other Wall Street brokers made millions of dollars by turning all their clients' funds over to Madoff for investment. This "house of cards" collapsed when the American economy took a downturn and a large number of Madoff's investors asked for the return of their money and found that their money had disappeared. A portion of the money undoubtedly was used to support Madoff's quiet but luxurious lifestyle. This included memberships in most of the leading golf clubs in New York and Florida, partial ownership of two corporate jets and of two boats, and multiple homes, including one in France. Madoff reportedly was a frequent visitor to a luxury hotel in France where rooms rented at roughly $7,000 per night. Despite his affluent lifestyle, Madoff was respected for his public service and his charitable foundation and gave generously to worthy organizations in New York City including Carnegie Hall, the Public Theater, the Special Olympics, and the Gift of Life Bone Marrow Foundation. He also served on the boards of directors of various worthy causes, serving on the boards of Yeshiva University and of the Yeshiva business school. Yeshiva recognized his contribution with a special award of appreciation. Madoff's public profile and prominent role in the community attracted investors eager to claim that they were represented by Bernard Madoff.

Madoff defrauded his friends, his own sister, and the institutions that trusted him and demonstrated that even the most educated and sophisticated members of American society can be tricked by a skilled con man. Madoff's clients included the family that owned the New York Mets baseball team and the former owner of the Philadelphia Eagles football club. His victims included Yeshiva University, the institution that had embraced and honored him. New York Law School and Tufts University also suffered a loss of portions of their endowments. A number of charitable organizations lost most of their resources, including the foundation of Elie Weisel, the famed Holocaust survivor and commentator. The collapse of charitable foundations meant that many nonprofit foundations that received donations now found that they had a shortage of money and confronted the prospect of closing their doors. The Picower Foundation lost roughly $268 million, threatening the foundation's ability to fund groups like the Children's Health Fund and the New York Public Library. The JEHT Foundation lost most of its assets and no longer would be able to fund social action organizations such as the Innocence Project, Human Rights First, Center for Investigative Reporting, and Juvenile Law Center. The foundation of the famed film producer Steven Spielberg, which supported prominent hospitals, also lost a portion of its assets.

The collapse of Madoff's empire reverberated across the financial landscape and across the globe. A number of New York real estate developers were forced to cancel construction projects due to a lack of funds. In the past several years, Madoff had attracted significant investments from individuals, banks, and institutions in Austria, South America, Spain, Sweden, Switzerland, Asia, and the Middle East. Several days following the announcement that Madoff's firm was an empty shell, a French investment broker, R. Thierry Magnon de law Villehuchet, slashed his wrists and was found dead in his New York City office. The newspapers reported instances in which the elderly and infirm who counted on Madoff's investments to keep them economically secure found that they had been "wiped out" financially and faced the prospect of selling their homes or apartments in order to survive.

There is no obvious explanation for Madoff's corrupt conduct. He was from an extremely modest background, had lifted himself out of poverty through sheer intelligence, and had saved the money he earned as a young man from menial jobs and proceeded to build one of the most successful firms on Wall Street. Madoff pioneered the use of computers for investing and was a past president of a national organization of financial analysts and served on the group's board of governors. The salaries in his firm were modest by Wall Street standards and yet he attracted a loyal group of employees who praised him for his personal kindness and concern for their welfare. He also made it a point to bring his brother, sons, and niece into the firm. Madoff prided himself on his integrity

and accountability to his investors and proclaimed that his motto was that "the name is on the door." It was Madoff's prominence and his powerful clientele that may have intimidated the Securities and Exchange Commission and deterred the organization from investigating the performance of his investments, which most experts agreed was "too good to be true." Some observers have commented that investors were willing to tolerate Madoff's suspected illegalities so long as they were benefiting financially.

Madoff, when arrested, had close to $170 million in signed checks in his desk that he apparently planned to distribute to friends and families before his records were seized. He was released on $10 million bail and confined to his $7 million penthouse. Shortly thereafter, it was discovered that Madoff had sent a million dollars in jewelry to friends and family in an apparent effort to prevent his property from being sold to compensate people whom he defrauded. To prevent this from occurring again, the judge ordered an inventory of all the objects in Madoff's apartment and an inspection of his outgoing mail. Was Madoff's 150-year sentence disproportionate?

Public Corruption

In 2004, the Corporate Crime Reporter released a report on public corruption in the United States. At the time of the report, three Connecticut mayors and the state treasurer had been sentenced to prison and the governor's former deputy chief of staff had pled guilty to accepting gold coins in return for government contracts. Governor John Rowland admitted that firms with state contracts had provided him with a hot tub and cathedral ceilings in his home. Connecticut, one of the cradles of American democracy, now was characterized by observers as the most corrupt state in the nation. Connecticut, however, is relatively "clean" compared to Mississippi, Louisiana, Illinois, Florida, and New York. In each of these states, a number of local and federal public officials have been accused of betraying the public trust by accepting or demanding money, campaign contributions, and other benefits in return for jobs, construction contracts, driver's licenses, and favorable judicial verdicts. These **crimes of official misconduct** are defined as the knowingly corrupt behavior by a public official in the exercise of his or her official responsibilities.[24]

The overwhelming number of prosecutions for public corruption are brought by federal authorities against state and federal officials. A study by the Corporate Crime Reporter of public corruption between 1993 and 2006 in states with populations of more than two million people concluded that the most corrupt states are Louisiana, Mississippi, Kentucky, Alabama, Ohio, Illinois, Pennsylvania, Florida, New Jersey, and New York. The least corrupt states are Washington, Utah, Kansas, Minnesota, Iowa, and Oregon. We all suffer when officials are corrupt because decisions are made based on monetary rewards rather than on the basis of what is best for the public.

The most frequently prosecuted state and federal official misconduct crime is the **bribery of a public official**. This offense, as we noted in discussing property offenses in Chapter 13, is committed by an individual who gives, offers, or promises a benefit to a public official as well as by a public official who demands, agrees to accept, or accepts a bribe. In other words, bribery punishes either giving or receiving a bribe and requires an intent to influence or to be influenced in carrying out a public duty. Bribery does not require a mutual agreement between the individuals. If you offer money to a police officer with the intent that he or she not charge you with a traffic offense, you are guilty of the bribery of a public official, regardless of whether the officer agrees to accept the bribe.

The offense of offering a bribe to a public official requires that:

- The accused wrongfully promised, offered, or gave money or an item of value to a public official.
- The individual occupied an official position or possessed official duties.
- The money or item of value was promised, offered, or given with the intent to influence an official decision or action of the individual.

The offense of soliciting a bribe requires that:

- The accused wrongfully asked, accepted, or received money or an item of value from a person or organization.
- The accused occupied an official position or exercised official duties.
- The accused asked, accepted, or received money or an item of value with the intent to have his or her decision or action influenced with respect to this matter.

Bribery is distinguished from **graft**. Graft does not require an intent to influence or to be influenced. Graft is defined as asking, accepting, receiving, or offering money or an item of value as compensation or a reward for an official decision. A builder that received a state contract to repair highways may express his or her appreciation and attempt to receive favorable consideration in the future by renovating a politician's summer home. Various state and federal statutes declare that it is a crime for a public official to ask for or to receive a reward for an official act. In such cases, the public is deprived of the right to receive "honest and faithful services."[25]

Why punish public bribery? Public officials are charged with acting in the interests of society rather than acting in the interest of individuals who provide a financial or other benefit. Corrupt behavior undermines confidence and trust in government, leads to dominance by the rich and powerful, and is contrary to the notion that every individual should be treated equally. In other words, government should be responsive to the majority of Americans rather than to the minority of millionaires.

For an international perspective on this topic, visit the study site.

The **Foreign Corrupt Practices Act** extends the concern with good government abroad and declares that it is illegal for an individual or U.S. company to bribe a foreign official in order to cause that official to assist in obtaining or retaining business. The statute makes an exception for "facilitating payments" to speed or insure the performance of a "routine governmental action," such as paying money to a foreign official to guarantee that an entry visa is quickly issued to a corporate employee. In 2005, the Titan Corporation in San Diego pled guilty and agreed to pay a fine of $28 million in settlement of various charges, including concealing a $2.1 million contribution to the election campaign of the president of the West African nation of Benin.[26]

The next case, *State v. Castillo,* discusses the basic elements of the law of bribery. Ask yourself whether this is clearly bribery.

Did the police officer demand and receive "unjust compensation" from the female motorist?

State v. Castillo, *877 So. 2d 690 (Fla. 2004),* Opinion by: Cantero, J.

Facts

We present the facts in the light most favorable to the jury verdict. At about 4 A.M. on March 9, 2000, nineteen-year-old A.S., who had been drinking heavily, was traveling at about 55 m.p.h. in a 40 m.p.h. speed zone when a police cruiser drove up behind her with its overhead lights on. The respondent, Miami-Dade County Police Officer Fernando Castillo, on duty and in uniform, was driving. A.S. pulled over near a Burger King restaurant. Using the patrol car's loudspeaker, Officer Castillo ordered her out of her vehicle. A.S. feared she would be arrested because she was both drunk and speeding. As she walked toward the officer, she stumbled. Castillo remarked that "the party must have been good." After rummaging through her wallet, Castillo told A.S. to follow him into the empty Burger King parking lot. She complied. They both exited their cars and talked for awhile. Castillo was very friendly, smiling and touching A.S.'s shoulder as he stood close to her. Castillo noticed alcohol on her breath. At one point, Castillo asked her, "Do you want to follow me?" She said, "What?" and he replied, "You are going to follow me." Afraid not to obey, she complied. Castillo led her to a nearby deserted warehouse area. Again they exited their cars. He leaned her back on the hood of her car, pulled her pants and panties down, and mumbled "something like 'let me get that thing on.'" Commenting that she had the body of a stripper, he had vaginal intercourse with her. Because she was scared, A.S. did not look or say or do anything, and when he finished, she felt wetness on her lower stomach. As they dressed, Castillo smiled and told her that she was lucky he did not give her a ticket. He gave her his beeper number, and they each drove away.

Castillo did not report his over-forty-minute encounter with A.S. Instead, he reported that during that time he was engaged in various other patrol duties. Castillo's version of events, which the jury rejected, differed from A.S.'s. He testified that A.S. waved him over as he was passing her; that she suggested they talk at the Burger King; that she unexpectedly followed him from there and waved him down again to chat some more, and they did; that she met him a few hours later when his shift ended; and that at that time, they engaged in masturbatory sex. Castillo testified that he did not tell the officers investigating A.S.'s allegations that he engaged in a sexual act with her because they did not ask.

Castillo was charged with, and a jury found him guilty of, unlawful compensation and official misconduct. The trial court denied Castillo's motion for judgment of acquittal. On appeal, the district court focused on

A.S.'s trial testimony that before she followed Castillo to the warehouse, he never specifically stated that he would arrest her if she did not have sex with him. The court concluded that because of "the absence of any spoken understanding," the State failed to establish an agreement to these terms. The court thus required direct evidence of a specific agreement to prove unlawful compensation.

During cross-examination, A.S. testified as follows:

Q: He never suggested he was going to arrest you for DUI?

A: No.

Q: He never said anything about along the lines of DUI, the entire encounter, did he?

A: No.

Q: It was never any quid quo pro [*sic*] that he wouldn't arrest you if you come with me, was there?

A: No.

The court affirmed Castillo's conviction for official misconduct. Castillo asks us to quash that part of the opinion. Because determination of this issue is not integral to the conflict issue presented for review, we do not address it.

The unlawful compensation statute provides in pertinent part as follows:

> It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty.

The Florida Statutes define the terms *benefit* and *corruptly*. *Benefit* means gain or advantage, or anything regarded by the person to be benefited as a gain or advantage, including the doing of an act beneficial to any person in whose welfare he or she is interested. *Corruptly* means an act committed with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

Issue

We must decide two related issues concerning the statute: (A) whether a violation may be proved through circumstantial evidence; and (B) whether the State must prove a specific agreement. We discuss these issues below.

Reasoning

The district court in this case reversed Castillo's conviction because the State failed to establish a "spoken understanding" that if A.S. submitted to sexual intercourse with Castillo, he would not issue her a citation. Thus, the court required direct evidence of an agreement between the public official and the person unlawfully compensating him. The government, on the other hand, argues that "while the state must show a quid pro quo, it should be permitted to establish this element indirectly, through the use of circumstantial evidence."

The statute itself is silent on the type of proof required. It certainly does not require either a "spoken understanding" or any other direct evidence of a violation. In the absence of explicit statutory direction, it has long been established that circumstantial evidence is competent to establish the elements of a crime, including intent. If an express agreement were required to prove a violation of the statute, a public servant "could receive funds or other benefits from interested persons" and avoid prosecution "so long as he never explicitly promises to perform his public duties improperly." The element of intent, being a state of mind, often can only be proved by circumstantial evidence. Therefore, we hold that circumstantial evidence can establish a violation of the unlawful compensation statute. The district court's requirement of a "spoken understanding" imposes too high a burden on the State and would prohibit prosecution of all but the most blatant violations. Public corruption has become sophisticated enough at least to expect that public officials soliciting or accepting unlawful compensation ordinarily will not be so audacious as to explicitly verbalize their intent.

The second, related issue we must consider is whether the unlawful compensation statute requires evidence of an agreement or meeting of the minds. The district court held it did. It concluded that without direct evidence that Officer Castillo actually stated that he would arrest A.S. if she did not have sex with him, there was only evidence that A.S. believed this to be true. We respectfully disagree.

A "quid pro quo" refers to something exchanged for something else. It does not require an agreement. Harassment of this variety requires no "meeting of the minds."

On its face, the statute does not require an agreement. In fact, it criminalizes the mere solicitation of a "benefit not authorized by law," regardless of whether the solicited party accepts the offer. The statute expressly makes it unlawful for a public servant corruptly to request, solicit, or accept any pecuniary or other benefit not authorized by law. Such language implies that although evidence of an agreement is sufficient to prove a violation—the statute also prohibits agreeing to accept a benefit—it is not required. Section 838.016(1) further requires that the public servant must request, solicit, accept, or agree to accept the unlawful benefit "corruptly," which means

"with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties." The statute thus focuses on the official's intent, not on an agreement. The statute does not require that the person from whom the public official requests or accepts a benefit agree to—or even understand—the exchange.

It is sufficient if the actor believes that he has agreed to confer or agreed to accept a benefit for the proscribed purpose, regardless of whether the other party actually accepts the bargain in any contract sense. . . . The evils of bribery are fully manifested by the actor who believes that he is conferring a benefit in exchange for official action, no matter how the recipient views the transaction. . . . Each defendant should be judged by what he thought he was doing and what he meant to do, not by how his actions were received by the other party. A specific agreement is not required. Only corrupt intent must be shown.

Holding

Applying our holdings that neither direct evidence nor evidence of a specific agreement is required to establish a violation of the statute, we conclude that competent, substantial evidence supports Castillo's conviction in this case. The evidence shows that Castillo, a uniformed officer in a marked patrol car, stopped A.S. while she was exceeding the speed limit. He recognized her intoxicated state when he remarked, after she stumbled, that "the party must have been good." He required A.S. to follow him to the nearby deserted restaurant parking lot where he was "very friendly" while they spoke. He smelled alcohol on her breath. He then required A.S. to follow him again, this time to a deserted warehouse area where he initiated and had intercourse with her. Afterwards, he told her she was lucky he did not ticket her, and he permitted her to leave. Castillo not only did not report his contact with A.S., but he misrepresented his activities during this almost hour-long period as official duties. Thus, the evidence of the officer's words and actions demonstrated his understanding that A.S. was violating the law when he stopped her, and his releasing A.S. without legal consequence after having sex with her demonstrates his corrupt intent in soliciting an unlawful quid pro quo.

The district court's conclusion that if Castillo thought that A.S. followed him to the warehouse voluntarily, then Castillo did not violate the statute, is groundless for two reasons. First, the evidence, taken in the light most favorable to the jury verdict, was that he required her to follow him. Second, as we explained above, the other participant's state of mind is irrelevant; it is the public servant's state of mind that matters. Although an agreement may be sufficient to prove a violation, it is not necessary. Accordingly, whether Castillo thought or believed A.S.'s actions were voluntary or whether her actions were in fact voluntary is irrelevant. Castillo demonstrated the causal relationship of his actions when he told A.S., after having intercourse with her, that she was lucky he did not give her a ticket. Thus, the competent, substantial evidence in this case demonstrates that Castillo acted with corrupt intent in accepting an unauthorized benefit—sex in exchange for his exercising his discretion not to issue a traffic citation.

Questions for Discussion

1. What is the prosecution required to establish in order to obtain a conviction for unjust compensation under Florida law?
2. Would Castillo's conviction have been affirmed by the Florida Supreme Court if an express agreement and direct (rather than circumstantial) evidence was required to establish unlawful compensation? Should an express agreement be required?
3. Would you have convicted Castillo, given that he did not mention that he had decided not to give A.S. a ticket until after the two engaged in sexual intercourse?
4. Would you charge and convict A.S. of offering to unjustly compensate Castillo?
5. Does the Florida statute punish both bribery and graft?
6. What is the societal interest in criminally convicting Castillo?

Chapter Summary

Sociologist Edwin Sutherland pioneered the concept of white-collar crime, defining this as crime committed by an individual of respectability and high social status in the course of his or her occupation. The Justice Department, in contrast, focuses on the types of offenses that constitute white-collar crime as well as on the economic status of the offender. The Justice Department defines white-collar crime as offenses that employ deceit and concealment rather than the application of force to obtain money, property, or service; to avoid the payment or loss of money; or to secure a business or professional advantage. The definition notes that white-collar criminals occupy positions of responsibility

and trust in government, industry, the professions, and civil organizations. In this chapter, we discussed some of the common white-collar criminal offenses.

Most white-collar crime prosecutions are undertaken by the federal government. These laws are based on the federal authority over interstate and foreign commerce and other constitutional powers. Environmental crimes threaten the health and natural resources of the United States and range from air and water pollution to the illegal transport and disposal of hazardous waste and pesticides. OSHA protects the health and safety of workers. Willful violations of the act that result in death are punished as a misdemeanor and may result in both a fine and imprisonment. A modest number of these violations have been pursued and cases are increasingly being referred to the EPA for prosecution.

The stock market is an important source of investment and retirement income for Americans. Securities law is designed to insure a free and fair market in order to maintain investor trust and confidence. The most active area of prosecution is insider trading, the use of information that is not publicly available to buy and sell stocks. Prosecutions for trading on the basis of inside information are brought against corporate insiders under a theory of "disclose or abate" and against corporate outsiders under a theory of "misappropriation."

A significant number of white-collar crime prosecutions are undertaken under the federal mail and wire fraud statutes. The mail fraud statute prohibits the knowing and intentional participation in a scheme or artifice to defraud money or property, the execution of which is undertaken through the use of the mails. The wire fraud statute requires the execution of an artifice or fraud through the use of wires that cross interstate or foreign boundaries. The mails or wires need only be used incident to an essential aspect of the scheme. A conspiracy to commit either of these offenses requires that the use of mails or wires will naturally occur in the course of the scheme or was reasonably foreseeable, although not actually intended.

The Travel Act is intended to assist state and local governments in combating organized crime and is directed at what ordinarily are considered the status offenses of illegal gambling, the shipment and sale of alcohol and controlled substances, extortion, bribery, arson, prostitution, and money laundering. This law punishes interstate or foreign travel or the use of the mails or any facility in interstate or foreign commerce with the intent to distribute the proceeds of one of the unlawful activities listed in the statute, to commit a crime of violence, or to commit a crime listed in the Travel Act. The law requires that a defendant thereafter attempt to commit or does commit a criminal offense.

Health fraud is an increasingly frequent and serious area of criminal activity. The federal health fraud statute addresses frauds against health insurance programs or the fraudulent obtaining of money or property from a health care benefit program. This typically involves claims by doctors to be reimbursed for unnecessary medical care or for medical care that was never provided.

A significant challenge confronting criminal offenders is to convert money or property obtained from illegal activity into what individuals can claim to be lawful income. The federal money laundering statute combats the "washing of money" by declaring that it is a crime to knowingly conduct a financial transaction involving the proceeds of a crime or to engage in a transaction involving property derived from criminal activity with the intent to conceal the source of the money or property or to promote an illegal enterprise.

The Sherman Antitrust Act is intended to insure free and competitive markets and declares that it is a crime to knowingly enter into a contract or to form a combination or conspiracy to interfere with interstate commerce. An example is price-fixing.

Public corruption costs the taxpayers a significant amount of money each year. These crimes of official misconduct are defined as the knowingly corrupt behavior by a public official in exercising his or her official responsibilities. An example is the bribery of a public official. Liability is imposed on both the individuals offering and accepting a bribe. Bribery is defined as wrongfully promising, offering, or giving money or a benefit with the intention of influencing an official decision or action. It is also bribery to ask for, accept, or receive money or a benefit with the intent to influence an official decision or action. Graft is defined as the unlawful compensation or reward for official action. The Foreign Corrupt Practices Act prohibits the bribery of overseas officials in order to assist in obtaining or retaining business.

In thinking about this chapter, consider whether sufficient attention is paid to the investigation and prosecution of white-collar crime. Would you punish white-collar criminals more or less severely than other offenders?

Chapter Review Questions

1. What are the various approaches to defining white-collar crime?
2. Should criminal law textbooks devote a separate chapter to the discussion of white-collar crime?
3. Do you believe that the federal government should make it a priority to prosecute white-collar crime?
4. List some of the acts that are considered environmental crimes.

5. What is the purpose of criminal prosecutions under OSHA?
6. Define insider trading. Why is insider trading considered a crime?
7. What are the elements of mail and wire fraud? How do they differ from one another?
8. Discuss the purpose of the Travel Act.
9. What areas are covered under the federal Health Fraud Act?
10. Why is money laundering considered a criminal offense? Provide an example of money laundering.
11. Discuss the purpose of the Sherman Antitrust Act. Give an example of an antitrust violation.
12. What is public bribery? Why is bribery a crime? How is it distinguished from graft?
13. Should the federal government use its interstate commerce power to prosecute what are traditionally considered state criminal offenses? Why not let state government pursue criminal prosecutions?
14. Who poses a greater threat to society, white-collar or common criminals?

Legal Terminology

bribery of a public official
crimes of official misconduct
disclose or abstain doctrine
environmental crimes
fiduciary relationship
Foreign Corrupt Practices Act
graft
insider trading
mail fraud
misappropriation doctrine
money laundering
Occupational Safety and Health Act
Sarbanes-Oxley Act
Sherman (Antitrust) Act of 1890
tippees
tippers
Travel Act
white-collar crime
wire fraud

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Go to the FBI Web site on white-collar crime and summarize the criminal offenses that are listed and note some of the relevant criminal statutes.
2. Examine the white-collar blog written by several prominent law professors and note some current developments.
3. Learn more about Martha Stewart. Were her crimes as serious as those committed by other high-profile, white-collar criminals? Was she singled out for prosecution because she is a successful woman?

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Neal Shover and John Paul Wright, *Crimes of Privilege: Readings in White-Collar Crime* (New York: Oxford University Press, 2000). An edited volume that provides a solid introduction to the academic literature on white-collar crime. Essays cover the characteristics of white-collar crime and of white-collar criminals, the motivation behind white-collar crime, and approaches to controlling white-collar crime.

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Crimes Against Public Order and Morality

15

Did the defendant's defense of the World Trade Center bombing constitute incitement to riot?

Viewed in context, defendant's words—IT'S GOOD THAT THE WORLD TRADE CENTER WAS BOMBED. MORE COPS AND FIREMEN SHOULD HAVE DIED. MORE BOMBS SHOULD HAVE DROPPED AND MORE PEOPLE SHOULD HAVE BEEN KILLED—were plainly intended to incite the crowd to violence, and not simply to express a point of view. But the allegations extend beyond mere words. It is further alleged that defendant accosted people in the crowd and shouted a threat—WE'VE GOT SOMETHING FOR YOUR ASSES—directly into the faces of some of the onlookers. It is also alleged that as the confrontation escalated, defendant and his accomplices refused police entreaties to disperse. This conduct went well beyond protected speech and firmly into the realm of criminal behavior. It was far more than "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence"; under the circumstances, it constituted the very real threat of violence itself.

Core Concepts and Summary Statements

Introduction

Crimes against public order and morality encompass offenses that create public inconvenience and annoyance, that disturb and threaten the peace and tranquility of neighborhoods, and that offend public morality. Crimes against morality raise the issue of victimless crimes and the overreach of criminal law.

Disorderly Conduct

Individual disorderly conduct is the purposeful causing of public inconvenience, annoyance, or alarm. This includes fights, noise, utterances, and hazardous conditions.

Riot

A riot is participation with others in a course of disorderly conduct with the purpose of committing an illegal act.

Public Indecencies: Quality-of-Life Crimes

A. Public indecencies include crimes that have a detrimental impact on the quality of life.
B. Vagrancy is wandering the streets with no apparent purpose. Loitering is standing in public with no apparent purpose. These crimes historically have been enforced against individuals viewed as "undesirables."
C. In recent years, municipal ordinances have been directed against the homeless and panhandlers.
D. A variety of legal strategies have been adopted to control the criminal activity of gangs, ranging from special antigang statutes to civil injunctions.

The Overreach of Criminal Law

A. There is an ongoing debate over whether the criminal law should punish victimless crimes. Some individuals question whether these offenses should be described as victimless.
B. Prostitution involves exchanging sex for money or for some item of value.

Obscenity

Obscenity is not protected under the First Amendment. Child pornography is entitled to even less protection.

Cruelty to Animals

There is a growing movement to protect the rights of animals and to punish cruelty to animals.

Introduction

You undoubtedly have been walking down the street and have been approached by a "panhandler" asking for money in an annoying or aggressive manner. He or she might even have followed you down the street or blocked the sidewalk. You may have felt that your "personal space" was invaded or that you were being personally assaulted and might have vowed to avoid walking down this particular street again. Although you did not suffer physical harm, you may have developed a sense of insecurity or even fear. Did the panhandler in this example commit a crime or merely exercise his or her freedom of speech and assembly?

Crimes against public order and morality are intended to insure that individuals walking on sidewalks, traveling on the streets, or enjoying the public parks and facilities are free from harassment, fear, threat, and alarm. This category of crime includes a large number of seemingly unrelated offenses that threaten the public peace, quiet, and tranquility. The challenge presented by these offenses is to balance public order and morals with the right of individuals to exercise their civil liberties.

A prime example of a crime against public order is individual disorderly conduct. This broadly defined offense involves acts that create public inconvenience and annoyance by directly threatening *individuals'* sense of physical safety. Disorderly conduct entails offenses ranging from intentionally blocking the sidewalk and acting in an abusive and threatening manner to discharging a firearm in public. Group disorderly conduct (riot) entails tumultuous or violent conduct by three or more persons.

The second category of crimes against public order and morals covered in this chapter includes offenses against the public order that threaten the order and stability of a *neighborhood*. We focus on two so-called quality-of-life crimes. At common law, vagrancy was defined as moving through the community with no visible means of support. Loitering at common law was defined as idly standing on the corner or sidewalk in a manner that causes people to feel a sense of threat or alarm for their safety. These broad vagrancy and loitering statutes historically have been employed to detain and keep "undesirables" off the streets. The U.S. Supreme Court in recent years has consistently found these laws void for vagueness and unconstitutional. The same constitutional arguments are being used today to challenge ordinances directed against the homeless and gangs.

The last section of the chapter on crimes against public order and morals examines the overreach of the criminal law or so-called victimless crimes. These are offenses against *morality*. The individuals who voluntarily engage in victimless crimes typically do not view their involvement as harmful to themselves or to others. We initially center our discussion of victimless crimes on prostitution and soliciting for prostitution. The next section on victimless crimes examines whether the prohibition on obscenity should be extended to violent video games that are thought to harm children or whether these games are protected under the First Amendment to the U.S. Constitution. We conclude our discussion of crimes against public order and morality by examining the use of the criminal law to protect domestic animals.

In this chapter, several issues arise. Ask yourself whether the statutes punishing crimes against public order and morality are, at times, employed to target certain undesirable individuals in order keep them off the streets rather than to protect society. Are some of these laws so broadly drafted that the police are provided with an unreasonable degree of discretion in determining whether to arrest individuals? Last, consider whether the criminal law reaches too far in punishing so-called victimless crimes. The overriding question is whether the enforcement of offenses against public order and morality is required in order to maintain social order and stability.

Disorderly Conduct

The common law punished a **breach of the peace**. This was defined as an act that disturbs or tends to disturb the tranquility of the citizenry. Blackstone notes that breaches of the peace included both acts that actually disrupted the social order, such as fighting in public, and what he terms constructive breaches of the peace or conduct that is reasonably likely to provoke or to

excite others to disrupt social order. Blackstone cites as examples of constructive breaches of the peace both the circulation of material causing a person to be subjected to public ridicule or contempt and the issuing of a challenge to another person to fight.[1]

The common law crime of breach of the peace constituted the foundation for American state statutes punishing **disorderly conduct**. An example of a statutory definition of the misdemeanor of disorderly conduct is the Wisconsin law that punishes anyone who "in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance."[2] Other statutes specify the conduct constituting disorderly conduct. The Illinois statute defines disorderly conduct as any act knowingly committed in an unreasonable manner so as to "alarm or disturb another and to provoke a breach of the peace." The Illinois law then elaborates on this definition and lists specific acts that constitute a breach of the public peace, including a false fire alarm or false report of criminal activity to the police, a false report of an explosive device, a false report of child or elder abuse, and an annoying or intimidating telephone call made to collect a debt.[3] The Arizona statute requires an act committed with a specific intent to disturb the peace or quiet of a neighborhood, family, or person or committed with the knowledge that it is disturbing the peace. The Arizona law lists fighting, unreasonable noise, use of abusive or offensive language to any person likely to cause retaliation, commotion intended to prevent a meeting or procession, refusal to obey a lawful order to disperse, or recklessly handling, displaying, or discharging a deadly weapon or dangerous instrument.[4]

We can see that the *mens rea* of the Illinois statute is knowingly, while the *mens rea* of the Arizona is an intentional or knowing intent. Other state statutes extend disorderly conduct to include the reckless disturbance of the peace. The Illinois and Arizona statutes differ in one other respect. The Arizona law covers acts intended to disturb or that knowingly disturb the peace or quiet of a neighborhood, family, or person, while the Illinois statute is generally directed at threats or acts that alarm the community. The commentary to the Model Penal Code notes that defining disturbing the peace to include disturbing individuals authorizes the police to intervene and arrest individuals whose playing of their radio or television is considered unreasonably loud by their next-door neighbor. Disorderly conduct is a misdemeanor, although some states punish as felonies acts that create or threaten to create a significant disturbance.

As you can see, a broad range of conduct is punished under disorderly conduct statutes. For instance, a parent was convicted of disorderly conduct who loudly and aggressively disputed a referee's decision at his son's football game, refused the referee's request to leave the stadium, swore at spectators, placed his hands on the referee, and caused a halt in the game. A Minnesota court of appeals ruled that the parent's profanity combined with his aggressive acts caused anxiety and concern to the spectators and referees and constituted disorderly conduct. How does the court know that the defendant's behavior "disturbed the peace"? Do people assume the risk that they will be subjected to emotional outbursts by spectators attending a football game?[5] In an Illinois case, a defendant who declared to ticketing agents at the airport that he had a bomb in his shoe was sentenced to more than six months in prison. An appellate court affirmed the defendant's conviction for transmitting a false alarm relating to a bomb or other explosive device. The court noted that disorderly conduct under Illinois law requires only the uttering of a threat regardless of the response of other individuals. The court explained this strict standard by observing that the defendant must have known that there was a strong probability that the threat of a bomb in an airport would "cause alarm and mass disruption."[6]

Another challenge that is frequently presented by prosecutions for disorderly conduct is drawing the line between disorderly conduct and constitutionally protected speech. The Wisconsin Supreme Court affirmed that the statement by a thirteen-year-old that he was going to kill everyone at his school and make people suffer constituted disorderly conduct. The court explained that speech alone could constitute disorderly conduct where "a reasonable speaker . . . would foresee that reasonable listeners would interpret his statements as serious expressions of an intent to intimidate or inflict bodily harm."[7]

Disorderly conduct addresses relatively minor acts of criminality. Nevertheless, the commentary to the Model Penal Code stresses that this is an important area because disorderly conduct statutes affect a large number of defendants. Arrests for disorderly conduct in a given year are generally equal to the number arrested for all violent crimes combined. Thus, the enforcement of disorderly conduct statutes is critical in shaping public perceptions as to the fairness of the criminal justice

system. A final point is that the concern of Americans with balancing crime control with civil liberties dictates that we take the time to consider whether disorderly conduct statutes intrude upon the rights of individuals and are in need of reform.

The next case in the book, *City v. Summers,* illustrates the type of factual analysis that is engaged in by courts in determining whether a defendant is guilty of disorderly conduct. Ask yourself whether you agree with the court's decision.

The Statutory Standard

Compare the Texas disorderly conduct statute to the laws previously discussed.

Texas Code Section 42.01. Disorderly Conduct

(1) A person commits an offense if he intentionally or knowingly:
- (a) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;
- (b) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace;
- (c) creates by chemical means, a noxious and unreasonable odor in a public place;
- (d) abuses or threatens a person in a public place in an obviously offensive manner;
- (e) makes unreasonable noise in a public place other than a sport shooting range . . . or in or near a private residence that he has no right to occupy;
- (f) fights with another in a public place;
- (g) discharges a firearm in a public place other than a public road or a sport shooting range . . . ;
- (h) displays a firearm or other deadly weapon in a public place in a manner calculated to alarm;
- (i) discharges a firearm on or across a public road;
- (j) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act; or
- (k) for a lewd or unlawful purpose:
  - (i) enters on the property of another and looks into a dwelling . . . through any window or other opening. . . .
  - (ii) while on the premises of a hotel . . . looks into a guest room. . . .
  - (iii) while on the premises of a public place, looks into an area such as a restroom or shower stall or changing or dressing room that is designed to provide privacy to a person using the area. . . .

(2) It is a defense to prosecution . . . that the actor had significant provocation for his abusive or threatening conduct. . . .

Model Penal Code

Section 250.2. Disorderly Conduct

(1) A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he
- (a) engages in fighting or threatening, or in violent or tumultuous behavior; or
- (b) makes unreasonable noise or offensively coarse utterances, gesture or display, or addresses abusive language to any person present; or
- (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

"Public" means affecting or likely to affect persons in a place to which the public or substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(2) An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation [subject to a fine].

Analysis

- The Model Penal Code limits disorderly conduct to specific acts likely to create what the code terms a public nuisance. The commentary notes that the proposed statute does not include conduct tending to corrupt or to annoy other individuals.
- The act must be committed with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof. Guilt cannot be based on the argument that an individual should have foreseen the risk of public annoyance or alarm; "nothing less than conscious disregard of a substantial and justifiable risk of public nuisance will suffice for liability. Conviction cannot be had merely on proof that the actor should have foreseen the risk of public annoyance or alarm."
- Disorderly conduct is directed at disturbing the peace and quiet of the community. The code excludes family disputes within the home.
- The section limits imprisonment to circumstances in which an individual's purpose is to cause significant harm or serious inconvenience or in which an individual continues the crime despite warnings or requests to halt.
- The Model Penal Code also includes specific sections on the abuse of a corpse; cruelty to animals; desecration of graves, monuments, and places of worship; disruption of meetings and processions; false public alarms; harassment; loitering or prowling; obstructing highways or other public passages and processions; public drunkenness; unlawful eavesdropping; surveillance; and breaching the privacy of messages.

Was Summers guilty of disorderly conduct?

CITY v. SUMMERS, *2003 OHIO 2773 (OHIO APP. 2003), PER CURIAM*

Defendant-appellant Terry Summers appeals the judgment of the Hamilton County Municipal Court convicting him, following a bench trial, of disorderly conduct . . . we reverse the judgment of the trial court and discharge Summers.

Facts

The record reveals the following facts. Terry Summers is a member of a group called "Black Fist," which protests allegations of police misconduct. In the early evening of August 1, 2002, Black Fist was protesting at the intersection of Vine Street and Fifth Street in downtown Cincinnati. Summers was walking back and forth across the street at the crosswalk, dragging a sign and shaking a small black baseball bat over his head. Upon observing Summers's actions while protesting, police officers arrested Summers for disorderly conduct because they perceived his actions as threatening to the passing motorists. Summers told the police that he was merely shaking the bat over his head and yelling "Black Power" to passing motorists. At trial, Police Officer David Johnston testified that Summers had been holding a bat over his head and that Officer Johnston believed that Summers's actions would provoke a violent response from passersby. Police Officer Pat Norton testified that Summers had been holding a small black baseball bat over his head and shaking it. But neither officer could hear what Summers was saying to the passing motorists.

At the conclusion of the testimony, the trial court found Summers guilty of disorderly conduct and ordered him to pay a $100 fine and court costs. In this appeal, Summers now brings forth . . . assignments of error.

Issue

In his first assignment of error, Summers asserts that the trial court's judgment was not supported by sufficient evidence. . . . R.C. 2917.11(A)(3) provides that "no person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following: . . . (3) insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response." Thus, we must determine if a reasonable trier of fact could have found that Summers had recklessly caused inconvenience, annoyance, or alarm to another

by insulting, taunting, or challenging another under circumstances in which such conduct was likely to provoke a violent response.

Reasoning

There is evidence in the record upon which a reasonable trier of fact could have found beyond a reasonable doubt that Summers had in fact caused inconvenience and annoyance. The two police officers testified that the protest occurred during the afternoon rush hour, that there was heavy motorist and pedestrian traffic, and that, despite the traffic, Summers was walking very slowly across the street. But the evidence was not sufficient to support the remaining elements of disorderly conduct beyond a reasonable doubt. There was no evidence that Summers had acted recklessly or had taunted or challenged any passing motorist. Summers stayed within the crosswalk when crossing the street and presumably crossed with the light in his favor, as there was no charge of jaywalking. Further, both officers testified that they had not heard what Summers was saying to the passing motorists. Although there was testimony that Summers had raised his bat in the air and shaken it, neither officer said that Summers had swung his bat at any passing car. Simply protesting within the limits of the law did not reasonably support the inference that Summers was insulting, taunting, or challenging passing motorists. Further, from our review of the record, we hold that peacefully protesting in a crosswalk while raising a small bat in the air and yelling "Black Power," without swinging the bat so as to hit a passing vehicle, was not something that was likely to provoke a violent response.

Holding

Accordingly, there was insufficient evidence to support the disorderly-conduct conviction beyond a reasonable doubt. . . . We reverse the judgment of the trial court and discharge Summers. . . .

Questions for Discussion

1. Why did the appellate court acquit Summers?
2. Was the court's decision influenced by the fact that Summers was engaging in an act of political protest? Should the appellate court reverse the decision of a lower court trial judge who was able to personally evaluate the credibility of the witnesses?
3. Do you agree with the appellate court's decision?

Riot

For a deeper look at this topic, visit the study site.

The common law punished group disorderly conduct as a misdemeanor. An **unlawful assembly** was defined as the assembling of three or more persons with the purpose to engage in an unlawful act. Taking steps toward the accomplishment of this common illegal purpose was punished as a **rout**. The law recognized a **riot** where three or more individuals engaged in an unlawful act of violence. The participants must have agreed to the illegal purpose prior to engaging in violence. However, the individuals were not required to enter into a common agreement to commit an illegal act prior to the assembly; the illegal purpose could develop during the course of the meeting. The English Riot Act of 1549 punished as a felony an assembly of twelve or more persons gathered together with an unlawful design that failed to obey an order to disperse within one hour of the issuance of the order to disband. The Riot Act was reintroduced in 1714. You may be interested to know that it is the reading of the act to an assembly that constitutes the basis of the popular phrase "reading the riot act."[8]

The American colonists were understandably reluctant to adopt a British statute that had been employed by the English Crown to punish people who gathered for purposes of political protest. However, all the states eventually adopted riot laws loosely based on the English statute. These laws continue to remain in force and, in effect, punish group disorderly conduct.

Why is there a separate offense of riot? After all, we could merely punish riot as aggravated disorderly conduct. A group has a mind of its own and both poses a greater threat to society and is less easily deterred than a single individual. Collective action also presents a problem for the police, who may have to resort to aggressive force to control the crowd. Courts have recognized that a clear distinction must be made between riots and the right of individuals to freely assemble to petition the government for the redress of grievances. In 1949, the U.S. Supreme Court upheld the constitutionality of an Arkansas riot statute, holding that it did not abridge free speech or assembly for the "state to fasten themselves upon one who has actively and consciously assisted" in the "promoting, encouraging and aiding of an assembly the purpose of which is to wreak violence."[9]

Under a New York statute, an individual is guilty of misdemeanor riot when, with four other persons, he engages in "tumultuous and violent conduct" and thereby "intentionally or recklessly causes or creates a grave risk of causing public alarm." The New York statutory scheme punishes riot as a felony when a group of ten or more persons engages in "tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm" and a person other than one of the participants suffers "physical injury or substantial property damage." What is the difference between misdemeanor and felony riot under the New York statute?[10]

New York also punishes the misdemeanor of unlawful assembly. An unlawful assembly is defined as the assembly of an individual with four or more others for the purpose of engaging or preparing to engage with them in "tumultuous and violent conduct likely to cause public alarm, or when, being present at an assembly which either has or develops such a purpose, he remains there with intent to advance that purpose." How does this differ from a riot? New York punishes incitement to riot when an individual "urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm."[11] Other states provide criminal penalties for the English statutory crime of a knowing failure to obey an order to disperse. An Ohio statute punishes five or more persons engaged in a course of disorderly conduct "who knowingly fail to obey an order to disperse where there are other persons in the vicinity whose presences creates the likelihood of physical harm to persons or property or of serious public inconvenience, annoyance, or alarm."[12]

Riot statutes are typically used when a conspiracy or accessoryship cannot be easily applied. The Utah riot statute provides that an individual is guilty of riot if "he assembles with two or more other persons with the purpose of engaging, soon thereafter, in tumultuous or violent conduct, knowing that two or more other persons in the assembly have the same purpose." In *J.B.A. v. State,* a Utah appellate court convicted a juvenile of riot and held him to be a delinquent. J.B.A. was determined to have been aware that his friends were collecting weapons and preparing to return to school to "settle some differences." The defendant voluntarily stood as part of a show of force in support of his friends as they fought with members of a rival group. The Utah court noted that J.B.A. was not an uninterested bystander and that he would have been expected to intervene in the event that his friends were in jeopardy of losing the fight. Does this situation fit your conception of participation in a riot? Why not merely punish this as conspiracy or as aiding and abetting disorderly conduct?[13]

In the next case, *People v. Upshaw,* the defendant was charged with inciting to riot and disorderly conduct after he and his friends confronted a crowd and praised the World Trade Center bombing and threatened crowd members. Consider whether the defendant was guilty of incitement to riot.

The Statutory Standard

Compare the approach in the New York statute to the law in Ohio.

Ohio Laws

Section 2917.03. Riot

(A) No person shall participate with four or more others in a course of disorderly conduct. . . .
  (1) With purpose to commit or facilitate the commission of a misdemeanor . . . ;
  (2) With purpose to intimidate a public official or employee into taking or refraining from official action, or with purpose to hinder, impede, or obstruct a function of government;
  (3) With purpose to hinder, impede, or obstruct the orderly process of administration or instruction at an educational institution, or to interfere with or disrupt lawful activities carried on at such institution.

(B) No person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such an act might otherwise be lawful. . . .

(C) Whoever violates this section is guilty of . . . a misdemeanor of the first degree.

Section 2917.02. Aggravated Riot

(A) No person shall participate with four or more others in a course of disorderly conduct. . . .
  (1) With purpose to commit or facilitate the commission of a felony;
  (2) With purpose to commit or facilitate the commission of any offense of violence;
  (3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or deadly ordnance. . . .

(B) (1) No person, being an inmate in a detention facility, shall violate . . . (A)(1), (2), or (3). . . .

(C) Whoever violates this section is guilty of aggravated riot . . . a felony. . . .

Model Penal Code

Section 250.1. Riot; Failure to Disperse

(1) A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct:
  (a) with purpose to commit or facilitate the commission of a felony or misdemeanor;
  (b) with purpose to prevent or coerce official action; or
  (c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

(2) Where three or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor.

Analysis

- The Model Penal Code requires that an individual participate together with two or more other persons in a course of disorderly conduct with the required purpose or knowledge. It is not sufficient that an individual was present at the assembly or disturbance.
- The Model Penal Code also punishes a failure to disperse.

Did the defendant incite a riot?

People v. Upshaw, *741 N.Y.S.2D 664 (CRIM. CT. N.Y.C. 2002),* Opinion by: Harrington, J.

Facts

It is alleged that, within days of the September 11, 2001 terrorist assault on the World Trade Center, defendant and several alleged accomplices, on 42nd Street in the vicinity of Times Square, shouted at a gathering crowd of approximately fifty people in praise of the terrorist attack and the resulting deaths of police officers, firefighters, and civilians; vehemently expressed their shared disappointment that the carnage had not been greater; and accosted people in the crowd, yelling in the onlookers' faces, "We've got something for your asses." It is further alleged that arguments ensued between defendants and some of the crowd and that defendant and his alleged accomplices refused to disperse after police officers asked them to do so.

Defendant argues that the accusatory instrument [indictment], which charges him and two codefendants with inciting to riot and disorderly conduct is not facially sufficient and must be dismissed. Specifically, defendant argues that his actions, rather than criminal, were an exercise of his right to free speech under the First Amendment of the United States Constitution. . . . After reviewing the complaint, and after consideration of defendant's motion to dismiss and the People's opposition thereto, the court concludes that the accusatory instrument is facially sufficient. Therefore, and for the following reasons, defendant's motion is denied.

Penal Law section 240.08 provides that a person is guilty of inciting to riot "when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm." Although Penal Law section 240.08 does not expressly provide for the element of intent, courts have recognized that in order to pass constitutional muster, the incitement statute necessarily includes the "elements of 'intent' and 'clear and present danger' before one's freedom of speech may be abridged under the First Amendment." "Thus, the People must prove not only that defendant's conduct . . . created a clear and present danger of riotous behavior, but also that by such conduct he in fact intended a riot to ensue." The complaint contains the following narrative of defendant's alleged criminal conduct:

> Deponent [Police Officer Charles Carlstrom] states that he observed each defendant at [234 W. 42nd Street in the County and State of New York] yelling and stating in substance: IT'S GOOD THAT THE WORLD TRADE CENTER WAS BOMBED. MORE COPS AND FIREMEN SHOULD HAVE DIED. MORE BOMBS SHOULD HAVE DROPPED AND MORE PEOPLE SHOULD HAVE BEEN KILLED. WE'VE GOT SOMETHING FOR YOUR ASSES.
>
> Deponent states that a total of 5 defendants (Eric White, Reggie Upshaw, Steven Murdock, Jesse Atkinson and Kyle Jones) where [*sic*] yelling the above statements to a crowd of approximately 50 people. Deponent states that said people gathered around defendants and some of said people yelled back at defendants.
>
> Deponent states that defendants did approach people in the crowd and yell in their faces.
>
> Deponent further states that defendants were asked to disperse and refused to do so.
>
> Deponent states that defendants' conduct caused the crowd to gather and arguments to ensue.

Issue

Arguing that the complaint does not allege that he acted with the requisite intent to incite a riot, defendant contends that the complaint alleges merely that he "spoke in praise of the assault on the World Trade Center and stated that worse should have happened," but does not allege that "defendant urged or encouraged people to commit acts of terrorism or treason." . . . Defendant analogizes his conduct to "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" in contrast to "preparing a group for violent action and steeling it to such action." In defendant's view, "the language attributed to defendant was an expression of a political nature, intended to spur debate and thought, not to create the type of public harm contemplated by the statute."

Reasoning

In analyzing whether the allegations in the complaint evince defendant's intent that his alleged conduct led to riotous behavior, and whether his alleged conduct created a clear and present danger of riotous behavior, it is necessary to consider defendant's words and deeds in the context in which he and his alleged accomplices spoke and acted. The alleged crime took place only days after one of the greatest catastrophes this nation has suffered—the overwhelming brunt of which was felt most keenly here in New York—and within sight of the massive smoke plume emanating from the still-smoldering mass grave site that had been the twin towers of the World Trade Center. It took place while many New Yorkers were grieving for the loss of loved ones or praying in hope that the missing might yet be found, and as New Yorkers, indeed, all Americans, held their collective breath at what, at the time, appeared to be the likelihood, if not the inevitability, of additional terrorist attacks. It was under these circumstances that defendant and his cohorts allegedly chose a crowded 42nd Street near Times Square as their venue not merely to engage in what any reasonable person would consider to be a vile and morally reprehensible diatribe, but to intentionally confront the gathering crowd, at point blank range, for the purpose of inciting riotous behavior. It is estimated that approximately 3,000 people died in the World Trade Center attack. By comparison, 2,403 Americans were killed in the attack on Pearl Harbor.

There can be no doubt that the words and deeds alleged in the complaint make out the elements of the crime of inciting to riot. According to the complaint, defendant and his accomplices used extremely inflammatory language calculated to cause unrest in the crowd; praising the tragic deaths of thousands of innocents at the hands of terrorists and wishing for even more carnage while the threat of further attacks loomed over the city cannot be considered "an expression of a political nature, intended to spur debate and thought, not to create the type of public harm contemplated by the statute" to use defendant's words. The talismanic phrase "freedom of speech" does not cloak all utterances in legality. "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace."

Holding

Viewed in context, defendant's words—IT'S GOOD THAT THE WORLD TRADE CENTER WAS BOMBED. MORE COPS AND FIREMEN SHOULD HAVE DIED. MORE BOMBS SHOULD HAVE DROPPED AND MORE PEOPLE SHOULD

HAVE BEEN KILLED—were plainly intended to incite the crowd to violence, and not simply to express a point of view. But the allegations extend beyond mere words. It is further alleged that defendant accosted people in the crowd and shouted a threat—WE'VE GOT SOMETHING FOR YOUR ASSES—directly into the faces of some of the onlookers. It is also alleged that as the confrontation escalated, defendant and his accomplices refused police entreaties to disperse. This conduct went well beyond protected speech and firmly into the realm of criminal behavior. It was far more than "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence"; under the circumstances, it constituted the very real threat of violence itself.

All that is required under Penal Law section 240.08 . . . is that defendant urge ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public harm. Angrily confronting and threatening a crowd of onlookers with the intent to stir the crowd to violence is sufficient; the object of that tumultuous or violent conduct is irrelevant so long as the conduct defendant urges is of a kind likely to cause public harm. . . .

Penal Law section 240.20 provides, in pertinent part, that a person is guilty of disorderly conduct "when, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof . . . he engages in fighting or in violent, tumultuous or threatening behavior." . . . Defendant's words and deeds as alleged in the complaint demonstrate his intent to cause public inconvenience, annoyance, or alarm, or recklessly create a risk thereof by engaging in tumultuous or threatening behavior. Therefore, defendant's request to dismiss both counts in the accusatory instrument is denied. . . .

Questions for Discussion

1. What is the prosecution required to prove to convict a defendant of incitement to riot?
2. Did the defendant possess the necessary intent? Did his speech create the clear and present danger of a violent response? Was there any violence resulting from the defendant's statements?
3. Was the decision of the court influenced by the topic and timing of the defendant's statements?
4. Would you convict the defendant of incitement to riot or disorderly conduct?
5. Should the defendant's freedom of speech be limited by the "heckler's veto," the fact that others object to the defendant's expression? The leading Supreme Court cases addressing freedom of expression and disorderly conduct are *Hess v. Indiana,* 414 U.S. 105 (1973), and *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

Public Indecencies: Quality-of-Life Crimes

Criminal law texts traditionally devote very little attention to **public indecencies**. These offenses include public drunkenness, vagrancy, loitering, panhandling, graffiti, and urinating and sleeping in public. A significant number of arrests and prosecutions are devoted to these **crimes against the quality of life**, but for the most part, they receive limited attention because they are misdemeanors, are swiftly disposed of in summary trials before local judges, and disproportionately target young people, minorities, and individuals from lower socioeconomic backgrounds.

In the 1980s, scholars began to argue that seemingly unimportant offenses against the public order and morals were key to understanding why some neighborhoods bred crime and hopelessness while other areas prospered. This so-called **broken windows theory** is identified with criminologists James Q. Wilson and George Kelling. Why the name broken windows? Wilson and Kelling argue that if one window in a building is broken and left unrepaired, this sends a signal that no one cares about the house and that soon every window will be broken. The same process of decay is at work in a neighborhood. A home is abandoned, weeds sprout, the windows are smashed, and graffiti is sprayed on the building. Rowdy teenagers, drunks, and drug addicts are drawn to the abandoned structure and surrounding street. Residents find themselves confronting panhandlers, drunks, and addicts and develop apprehension about walking down the street and flee the area as property values drop and businesses desert the community. The neighborhood now has reached a tipping point and is at risk of spiraling into a downward cycle of crime, prostitution, drugs, and gangs. The solution, according to Wilson and Kelling, is to address small concerns before they develop into large-scale crimes.[14]

We can question, along with some researchers, whether small incidents of disorder inevitably lead to petty crime, then to serious offenses, and finally to neighborhood decay. Nevertheless, surveys indicate that most people are more concerned with the immediate threat to their quality

of life posed by rowdy juveniles, drug dealers, prostitutes, and public drunkenness than they are with the more distant threats of rape, robbery, and murder.

A central focus of the broken windows theory in cities where it has been adopted is combating vagrancy and loitering.

Vagrancy and Loitering

Vagrancy is defined under the common law as wandering the streets with no apparent means of earning a living (without visible means of support). **Loitering** is a related offense defined as standing in public with no apparent purpose.

Vagrancy can be traced to laws passed in England as early as the thirteenth century. The early vagrancy statutes were passed in reaction to the end of the feudal system and required the vast army of individuals wandering the countryside to seek employment. These same laws were relied on during the labor shortage resulting from the Black Death in the fourteenth century to force individuals into the labor market. There was also the fear that these bands of men might loiter or gather together to engage in crime or rebellion.

The Statute of Laborers of 1349 authorized the imprisonment of males under sixty without means of financial support who refused to work. The Impotent Poor Act of 1530 stipulated that an impotent beggar who wandered from home and was engaged in begging was to be whipped or placed in stocks for three days and nights on bread and water. Able-bodied, but unemployed, wanderers were later subjected to harsh penalties, including branding and slicing off portions of the ear. Another provision stated that any person found begging or wandering shall be "stripped naked from the middle upwards, and be openly whipped until his or her body be bloody." An English law in force in the second half of the nineteenth century divided vagrants into three criminal classes: idle and disorderly persons (people who refuse to work), rogues and vagabonds (wanderers), and incorrigible rogues (repeat offenders). This descriptive language eventually found its way into the texts of American statutes.[15]

Statutes punishing vagrancy were adopted in virtually every American state. These laws typically punished a broad range of behavior, including wandering or loitering, living without employment and having no visible means of support, begging, failing to support a wife and child, and sleeping outdoors. Individuals were also punished for their status or lifestyle. Laws, for instance, condemned and categorized as criminal, prostitutes, drunkards, gamblers, gypsies engaged in telling fortunes, nightwalkers, corrupt persons, and individuals associating with thieves.[16]

The fear and distrust of the poor and unemployed led the U.S. Supreme Court to observe, in reference to an 1837 effort by New York City to prevent the inflow of the poor, that it is as necessary for a "state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported or from a ship, the crew of which may be laboring under an infectious disease."[17]

By 1941, the U.S. Supreme Court had adopted a more sympathetic attitude toward the poor. California passed a statute in the early twentieth century preventing the influx of indigents. This was an unapologetic effort to limit budgetary expenditures for the poor and to prevent the introduction into the state of disease, rape, incest, and labor unrest. The Supreme Court criticized California and observed that it now was recognized in an industrial society that the "the relief of the needy has become the common responsibility and concern of the whole nation" and that "we do not think it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous." Justice Robert Jackson added that it is contrary to the history and tradition of the United States to make an individual's rights dependent on his or her economic status, race, creed, or color. As Justice Douglas noted, to hold a law constitutional that prevented those labeled as "indigents, paupers, or vagabonds" from seeking "new horizons" in California would be to reduce these individuals to an "inferior class of citizenship."[18]

In 1972, in the case of *Papachristou v. City of Jacksonville* (discussed in Chapter 2), the U.S. Supreme Court held a Jacksonville, Florida, ordinance unconstitutional that authorized the arrest of vagrants. This was a typical statute that classified a wide range of individuals as vagrants, including rogues, vagabonds, dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games, common drunkards, nightwalkers, pilferers or pickpockets,

keepers of gambling places, common brawlers, habitual loafers, persons frequenting houses of ill fame, gambling houses, and places where alcoholic beverages are sold, and individuals living on the earnings of their wives or minor children.

The U.S. Supreme Court ruled that the statute was void for vagueness in that it failed to give a person of ordinary intelligence fair notice of the conduct that is prohibited by the statute and encourages the police to engage in arbitrary and erratic arrests and convictions. The Court explained that the true evil in the law was its employment by the police to target the young, the poor, and minorities. The "rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."[19]

Eleven years later, in *Kolender v. Lawson* (discussed in Chapter 2), the U.S. Supreme Court ruled a California loitering statute unconstitutional that authorized the arrest of persons who loiter or wander on the streets who fail to provide "credible and reliable" identification and to "account for their presence." The lack of a clear statement of what constitutes credible and reliable identification, according to the Court majority, left citizens uncertain how to satisfy the letter of the law and empowered the police to enforce the law in accordance with their individual biases and discretion.[20]

States now have amended their vagrancy and loitering statutes and have followed the Model Penal Code in punishing loitering or prowling under specific circumstances that "warrant alarm for the safety of persons or property."

The Statutory Standard

Consider the difference between the Jacksonville vagrancy statute and the California vagrancy statute.

California Penal Code Section 653(g)

Every person who loiters about any school or public place at or near which children attend or normally congregate and who remains at any school or public place at or near which children attend or normally congregate, or who reenters or comes upon a school or place within seventy-two hours after being asked to leave by the chief administrative official of that school . . . [or by member of the security patrol, city police officer, or sheriff] is a vagrant and is punishable by a fine of not exceeding one thousand dollars ($1,000) or by imprisonment in the county jail not exceeding six months, or by both the fine and the imprisonment. . . . "Loiter" means to delay, to linger, or to idle about a school or public place without lawful business for being present.

Model Penal Code

Section 250.6. Loitering or Prowling

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

Homelessness

City and local governments have increasingly relied on municipal ordinances to stem the tide of a growing homeless population. The National Coalition for the Homeless issued a report in 2006 titled *A Dream Denied: The Criminalization of Homelessness in U.S. Cities* that documents the

increase and enforcement of laws prohibiting urban camping, sleeping in the parks and subways, aggressive panhandling, trespassing in areas under bridges and adjacent to parks, and blocking sidewalks. Several cities also prohibit charities, churches, and other organizations from serving food to the needy outside designated areas. The report concludes that these local ordinances have the effect of making it a crime to be homeless. The National Coalition for the Homeless lists the twenty "meanest cities" (including Sarasota, Florida; Lawrence, Kansas; Little Rock, Arkansas; Atlanta, Georgia; Las Vegas, Nevada; and Dallas and Houston, Texas). In 2004, the coalition in the report *Illegal to Be Homeless* ranked the "meanest states" as California, Florida, Hawaii, and Texas. In 1992, in *Pottinger v. City of Miami,* a federal district court ruled that the Miami police had employed the criminal law for the purpose of "eliminating or eradicating the presence of the homeless" or for "getting the homeless to move out of certain locations." One component of this strategy was to starve the homeless by preventing them from congregating in areas where pantries made free food available. The federal court found that the evidence supported the complainants' assertion that "there is no public place where they can perform basic, essential acts such as sleeping without the possibility of being arrested" and issued a judicial order directing the Miami police to halt this abuse of the criminal law. Another troubling trend is random violence by groups of young people against the homeless.[21]

The next case, *Joyce v. City and County of San Francisco,* involves a legal action seeking to prohibit San Francisco from enforcing the "Matrix Program" against the city's homeless population. Should a locality be prohibited from taking steps to control the homeless population?

Did San Francisco unconstitutionally target the homeless?

Joyce v. City and County of San Francisco, *846 F. SUPP. 843 (N.D. CAL. 1994),* Opinion by: Jensen, J.

Plaintiffs to this action seek preliminary injunctive relief on behalf of themselves and a class of homeless individuals alleged to be adversely affected by the City and County of San Francisco's (the "City's") "Matrix Program." While encompassing a wide range of services to the City's homeless, the Program simultaneously contemplates a rigorous law enforcement component aimed at those violations of state and municipal law that arguably are committed predominantly by the homeless. Plaintiffs endorse much of the Program, challenging it not in its entirety but only insofar as it specifically penalizes certain "life sustaining activities" engaged in by the homeless. . . .

Facts

Institution of the Matrix Program followed the issuance of a report in April of 1992 by the San Francisco Mayor's Office of Economic Planning and Development, which attributed to homelessness a $173 million drain on sales in the City. In August of 1993, the City announced commencement of the Matrix Program, and the San Francisco Police Department began stringently enforcing a number of criminal laws. The City describes the Program as "initiated to address citizen complaints about a broad range of offenses occurring on the streets and in parks and neighborhoods." The program addresses offenses including public drinking and inebriation; obstruction of sidewalks; lodging, camping, or sleeping in public parks; littering; public urination and defecation; aggressive panhandling; dumping of refuse; graffiti; vandalism; street prostitution; and street sales of narcotics, among others.

An illustration of the enforcement efforts characteristic of the Program can be found in a four-page intradepartmental memorandum addressed to the Police Department's Southern Station Personnel. That memorandum, dated August 10, 1993, and signed by acting Police Captain Barry Johnson, defines "Quality of Life" violations and establishes a concomitant enforcement policy. Condemning a "type of behavior [which] tends to make San Francisco a less desirable place in which to live, work or visit," the memorandum directs the vigorous enforcement of eighteen specified code sections, including prohibitions against trespassing, public inebriation, urinating, or defecating in public; removal and possession of shopping carts; solicitation on or near a highway; erection of tents or structures in parks; obstruction and aggressive panhandling.

Pursuant to the memorandum, all station personnel shall, when not otherwise engaged, pay special attention and enforce observed "Quality of Life" violations. . . . One Officer . . . shall, daily, be assigned specifically to enforce all "Quality of Life" violations. . . .

In a Police Department Bulletin entitled "Update on Matrix Quality of Life Program," dated September 17, 1993, Deputy Chief Thomas Petrini paraphrased General Order D-6, the source of the intended nondiscriminatory policy of the Program's enforcement measures by stressing that all persons have the right to use the public streets and

places so long as they are not engaged in specific criminal activity. Chief Petrini stressed that race, sex, sexual preference, age, dress, or appearance do not justify enforcement. The memorandum stated that the "rights of the homeless must be preserved," and included as an attachment a Department Bulletin on "Rights of the Homeless," which stated that:

> [All members of the Department] are obligated to treat all persons equally, regardless of their economic or living conditions. The homeless enjoy the same legal and individual rights afforded to others. Members shall at all times respect these rights.

The Police Department has, during the pendency of the Matrix Program, conducted continuing education for officers regarding nondiscriminatory enforcement of the Program. In 1993, a police report recorded that since implementation of the Matrix Program, the City estimates that "according to unverified statistics kept by the Department," approximately sixty percent of enforcement actions have involved public inebriation and public drinking, and that other "significant categories" include felony arrests for narcotics and other offenses, and arrests for street sales without a permit. Together, enforcement actions concerning camping in the park, . . . sleeping in the park during prohibited hours, . . . and lodging . . . have constituted only approximately ten percent of the total.

Plaintiffs, pointing to the discretion inherent in policing the law enforcement measures of the Matrix Program, allege certain actions taken by police to be "calculated to punish the homeless." As a general practice, the Program is depicted by plaintiffs as "targeting hundreds of homeless persons who are guilty of nothing more than sitting on a park bench or on the ground with their possessions, or lying or sleeping on the ground covered by or on top of a blanket or cardboard carton." On one specific occasion, according to plaintiffs, police "cited and detained more than a dozen homeless people, and confiscated and destroyed their possessions, leaving them without medication, blankets or belongings to cope with the winter cold."

The City contests the depiction of Matrix as a singularly focused, punitive effort designed to move "an untidy problem out of sight and out of mind." Instead, the City characterizes the Matrix Program as "an interdepartmental effort . . . [utilizing] social workers and health workers . . . [and] offering shelter, medical care, information about services and general assistance. Many of those on the street refuse those services, as is their right; but Matrix makes the choice available." . . . The City claims it has attempted to conjoin its law enforcement efforts with referrals to social service agencies. One specific element of the Program seeks to familiarize the homeless with those services and programs available to them. This is accomplished by the dispersal of Department of Social Service social workers throughout the City in order to contact homeless persons.

Another element of the Matrix Program—the Night Shelter Referral Program—attempts to provide temporary housing to those not participating in the longer-term housing program. This effort was begun in December of 1993 and is designed to offer the option of shelter accommodations to those homeless individuals in violation of code sections pertaining to lodging, camping in public parks, and sleeping in parks during prohibited hours. . . . The City contends that of 3,820 referral slips offered to men, only 1,866 were taken and only 678 actually utilized to obtain a shelter bed reserved for Police referrals. By the City's reckoning, "these statistics suggest that some homeless men may prefer to sleep outdoors rather than in a shelter."

The City emphasizes its history as one of the largest public providers of assistance to the homeless in the State, asserting that "individuals on general assistance in San Francisco are eligible for larger monthly grants than are available almost anywhere else in California." Homeless persons within the City are entitled to a maximum general assistance of $345 per month—an amount exceeding the grant provided by any of the surrounding counties. General assistance recipients are also eligible for up to $109 per month in food stamps. According to the City, some 15,000 City residents are on general assistance, of whom 3,000 claim to be homeless.

The City's Department of Social Services encourages participation in a Modified Payments Program offered by the Tenderloin Housing Clinic. Through this program, a recipient's general assistance check is paid to the Clinic, which in turn pays the recipient's rent and remits the balance to the recipient. The Clinic then negotiates with landlords of residential hotels to accept general assistance recipients at rents not exceeding $280 per month.

By its own estimate, the City will spend $46.4 million for services to the homeless for 1993–1994. Of that amount, over $8 million is specifically earmarked to provide housing and is spent primarily on emergency shelter beds for adults, families, battered women, and youths. An additional $12 million in general assistance grants is provided to those describing themselves as homeless, and free health care is provided by the City to the homeless at a cost of approximately $3 million.

The City contends that "few of the Matrix-related offenses involve arrest." Those persons found publicly inebriated, according to the City, are taken to the City's detoxification center or district stations until sober. "Most of the other violations result in an admonishment or a citation."

Since its implementation, the Matrix Program has resulted in the issuance of over 3,000 citations to homeless persons. Plaintiffs contend these citations have resulted in a cost to the City of over $500,000. Citations issued for encampment and sleeping infractions are in the amount of $76. . . . Those cited must pay or

contest the citation within twenty-one days; failure to do so results in a $180 warrant for the individual's arrest, which is issued approximately two months after citation of the infraction. Upon the accrual of $1,000 in warrants, which equates roughly to the receipt of six citations, an individual becomes ineligible for citation release and may be placed in custody. The typical practice, however, is that those arrested for Matrix-related offenses are released on their own recognizance or with "credit for time served" on the day following arrest. Plaintiffs characterize the system as one in which "homeless people are cycled through the criminal justice system and released to continue their lives in the same manner, except now doing so as 'criminals.'" . . .

Plaintiffs have proffered estimates as to the number of homeless individuals unable to find nightly housing. Plaintiffs cite a survey conducted by Independent Housing Services, a nonprofit agency that among its aims seeks the improvement of access to affordable housing for the homeless. Begun in July of 1990 and conducted most recently in August of 1993, the survey tracks the number of homeless individuals turned away each night from shelters in the San Francisco area due to a lack of available bed space. Based on the data of that survey, plaintiffs contend that from January to July of 1993, an average of 500 homeless persons was turned away nightly from homeless shelters. That number, according to plaintiffs, increased to 600 upon the closing of the Transbay Terminal.

Issue

The named plaintiffs to this action have been exposed differently to the enforcement of the Matrix Program and to the rigors of a life of homelessness. Plaintiffs assert they are "homeless" individuals since they lack a "fixed, regular, and adequate nighttime residence." . . . On November 23, 1993, these plaintiffs filed a class action complaint seeking injunctive and declaratory relief against the City.

Plaintiffs have at this time moved the court to preliminarily enjoin the City's enforcement of certain state and municipal criminal measures that partially define the Matrix Program. Given this posture of the litigation, the court is called upon to decide whether to grant a preliminary injunction in the exercise of its equitable powers. Such relief constitutes an extraordinary use of the court's powers and is to be granted sparingly and with the ultimate aim of preserving the status quo pending trial on the merits. . . . Plaintiffs urge the court to implement an injunction under which the City shall be preliminarily enjoined from enforcing, or threatening to enforce, statutes and ordinances prohibiting sleeping, "camping" or "lodging" in public parks, or the obstruction of public sidewalks against the plaintiff class of homeless individuals for life-sustaining activities such as sleeping, sitting, or remaining in a public place. . . .

Reasoning

The injunction sought by plaintiffs at this juncture of the litigation must be denied . . . the proposed injunction lacks the necessary specificity to be enforceable and would give rise to enforcement problems (would the police be prevented from arrests for urinating and defecating in public or aggressive panhandling? How can the police determine who is a homeless person who is immune from arrest?). . . . The court cannot find at this time that upon conducting the required balance of harm and merit, plaintiffs have established a sufficient probability of success on the merits to warrant injunctive relief.

When asked by the court whether, under the proposed injunction, the City would be able to cite plaintiff Joyce for public camping, counsel for plaintiffs answered as follows: such citation might be permissible if Joyce had lodging available that night but would be otherwise impermissible. Counsel for plaintiffs suggested at the hearing that enforcement difficulties could be mitigated if police would merely ask questions to determine whether the person is "homeless" before citing him. This suggestion is no solution. . . . Responding to a question of the court, counsel for plaintiffs suggested at the hearing that anyone who placed and used three tents on San Francisco's Civic Plaza for a period of three days would have engaged in unpunishable activity under the proposed injunction. . . . The court cannot at this time sanction such a result. . . . The City's homeless have never been altogether immunized from enforcement of the various laws at issue here. . . .

Plaintiffs contend enforcement of the Matrix Program unconstitutionally punishes an asserted "status" of homelessness. The central thesis is that since plaintiffs are compelled to be on the street involuntarily, enforcement of laws that interfere with their ability to carry out life-sustaining activities on the street must be prohibited. . . . As a threshold matter, plaintiffs' citation to various court decisions striking down statutes criminalizing vagrancy is of indirect assistance to the present analysis. . . . The present efforts under the Matrix Program are dissimilar from those successfully challenged. . . . Matrix targets the commission of discrete acts of conduct, not a person's appearance as a vagrant. . . . Plaintiffs argue that the failure of the City to provide sufficient housing compels the conclusion that homelessness on the streets of San Francisco is cognizable as a status. This argument is unavailing at least for the fundamental reason that status cannot be defined as a function of the discretionary acts of others. . . . Although the plaintiffs' . . . challenge to the Matrix Program law enforcement activities will appropriately be subject to further scrutiny in this case, on this record, the plaintiffs have not demonstrated a probability of success on the merits of this claim. . . .

Predicate to an equal protection clause violation is a finding of governmental action undertaken with an intent to discriminate against a particular individual or class of

individuals. In the present case, plaintiffs have not at this time demonstrated a likelihood of success on the merits of the equal protection claim, since the City's action has not been taken with an evinced intent to discriminate against an identifiable group. As discussed above, various directives issued within the Police Department mandate the nondiscriminatory enforcement of Matrix. . . . Further, the Police Department has, during the pendency of the Matrix Program, conducted continuing education for officers regarding nondiscriminatory enforcement of the Program.

It has not been proven at this time that Matrix was implemented with the aim of discriminating against the homeless. That enforcement of Matrix will . . . fall predominantly on the homeless does not in itself effect an equal protection clause violation. Notably, the absence of such a finding of intentional discrimination. . . .

Even were plaintiffs able at this time to prove an intent to discriminate against the homeless, the challenged sections of the Program might nonetheless survive constitutional scrutiny. Only in cases where the challenged action is aimed at a suspect classification, such as race or gender, or premised upon the exercise of a fundamental right, will the governmental action be subjected to a heightened scrutiny. . . . [T]he challenged Program would likely be tested only against a rational basis.

Plaintiffs contend the Matrix Program has been enforced in violation of the due process clauses of the United States . . . [in that] certain state codes are unconstitutionally vague.

Plaintiffs claim that San Francisco Park Code section 3.12 has been applied by police in an unconstitutional manner. That section provides that "no person shall construct or maintain any building, structure, tent or any other thing in any park that may be used for housing accommodations or camping, except by permission from the Recreation and Park Commission."

Plaintiffs contend the Police Department has impermissibly construed this provision to justify citing, arresting, threatening, and "moving along" those "persons guilty of nothing more than sitting on park benches with their personal possessions or lying on or under blankets on the ground." Plaintiffs have submitted declarations of various homeless persons supporting the asserted application of the San Francisco Park Code section. It appears, if plaintiffs have accurately depicted the manner in which the section is enforced, that the section may have been applied to conduct not covered by the section and may have been enforced unconstitutionally. . . .

Issuance of the remedy sought by plaintiffs would nevertheless be premature at this stage of the litigation. Police have been continually and increasingly educated in proper enforcement of the measures. Moreover, as it appears many of the alleged violations occurred prior to such instructions, it has not been sufficiently demonstrated by plaintiffs that the problematic enforcement continues, such that the continuing injury predicate to issuance of injunctive relief still exists. . . .

Plaintiffs also contend that San Francisco Park Code section 3.12 and California Penal Code section 647(i) are unconstitutionally . . . vague. Section 647(i) . . . punishes as a misdemeanor any person who "lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof."

The possible success of the vagueness challenge is . . . in doubt, as it seems readily apparent the measure is not "impermissibly vague in all of its applications. . . ." This likely failing follows from plaintiffs' inability to prove at this stage that police have been granted an excess of discretion pursuant to the statute. Plaintiffs assert vagueness in the San Francisco Park Code prohibition against maintaining "any other thing" that "may be used for . . . camping" and in enforcing the Penal Code prohibition against one "who lodges in . . . public." The plaintiffs claim that "the vagueness of these [Park Code] terms has apparently allowed San Francisco police officers to determine that blankets or possessions in carts are sufficiently connected to 'camping' to violate the ordinance." Plantiffs have . . . submitted declarations of homeless person supporting these assertions and a concession by Assistant District Attorney Paul Cummins to the effect that the standards for enforcement are vague. . . .

The challenged Penal Code section cannot be concluded by the court at this time to be unconstitutionally vague. Read in conjunction with supplemental memoranda, the challenged measures appear, as a constitutional matter, sufficiently specific. Police officers were specifically cautioned in a September 17, 1993, memorandum that "the mere lying or sleeping on or in a bedroll of and in itself does not constitute a violation." While plaintiffs argue the additional memoranda were circulated too late to save the enforcement measures from vagueness and that they do not eliminate the confusion, it is far from clear that plaintiffs could meet the requisite showing that the measure was impermissibly vague in all its applications. Accordingly, even if the limits of permissible enforcement of these sections have not been perfectly elucidated, preliminary injunctive relief is inappropriate at this stage of the litigation.

Holding

In common with many communities across the country, the City is faced with a homeless population of tragic dimension. Today, plaintiffs have brought that societal problem before the court, seeking a legal judgment on the efforts adopted by the City in response to this problem. The role of the court is limited structurally by the fact that it may exercise only judicial power and technically by the fact that plaintiffs seek extraordinary pretrial relief. The court does not find that plaintiffs have made a showing at this time that constitutional barriers exist that preclude that effort. Accordingly, the court's judgment at this stage of the litigation is to permit the City to

continue enforcing those aspects of the Matrix Program now challenged by plaintiffs.

The court therefore concludes that the injunction sought, both as it stands now and as plaintiffs have proposed to modify it, is not sufficiently specific to be enforceable. Further, upon conducting the required balance of harm and merit, the court finds that plaintiffs have failed to establish a sufficient probability of success on the merits to warrant injunctive relief. Accordingly, plaintiffs' motion for a preliminary injunction is denied.

Questions for Discussion

1. What is the Matrix Program? Why was it implemented by San Francisco? Did this program become necessary as a result of San Francisco's failure to provide adequate social programs for the homeless?
2. The lawyers for the homeless concede that portions of the Matrix Program are necessary. They are primarily concerned with freedom for the homeless to sleep in the parks and protecting the property and shopping carts of the homeless from seizure by the police. What do police arrest statistics indicate concerning whether this is a primary part of the Matrix Program? Are arrest statistics an accurate indicator of the conduct of the police?
3. Summarize the plaintiffs' contentions and the court's response concerning whether the Matrix Program unconstitutionally discriminates against the homeless and violates due process by targeting the homeless.
4. The lawyers for the homeless challenge as void for vagueness the law permitting arrest for "any other thing" that may be used for "camping" and the arrest of any person who "lodges in . . . public." They are particularly concerned that the police allegedly seize the blankets and possessions of the homeless. Does the police memorandum clarify these terms?
5. Explain why the plaintiffs' vagueness claim failed.
6. As a member of the San Francisco City Council, would you support the Matrix program? Why or why not?

Cases and Comments

Panhandling. A number of jurisdictions have adopted ordinances prohibiting street begging or panhandling. The Second Circuit Court of Appeals, in *Lopez v. New York Police Department,* 999 F.2d 899 (2d Cir. 1993), held that a statute that prohibited all panhandling on city sidewalks and streets violated the First Amendment. Indianapolis, in July 1999, responded by prohibiting "aggressive panhandling." This illegal activity was defined as touching the solicited person, approaching an individual standing in line and waiting to be admitted to a commercial establishment, blocking an individual's entrance to any building or vehicle, following a person who walks away from the panhandler, using profane or abusive language or statements or gestures that would "cause a reasonable person to be fearful or feel compelled," and panhandling in a group of two or more persons. The ordinance also prohibited soliciting at various locations, including bus stops, sidewalk cafes, vehicles parked or stopped on a public street, and within twenty feet of an automatic teller machine. Panhandling is also prohibited under the ordinance after sunset or before sunrise. Each act in violation of the ordinance is punishable by a fine of not more than $2,500. The court was authorized to issue an injunction or order prohibiting an individual convicted of violating the ordinance from repeating this violation. Violation of the injunction was punishable with imprisonment.

The ordinance was challenged by Jimmy Gresham, a homeless person who lived on a Social Security disability benefit of $417 per month. Gresham supplemented this income by panhandling. The Seventh Circuit Court of Appeals ruled that Indianapolis possessed a legitimate interest in promoting the safety and convenience of its citizens on the public streets, places, and parks and that the ordinance was a reasonable time, place, and manner restriction of speech. The court noted that the ordinance does not ban all panhandling, it merely restricts solicitations to situations that are considered "especially unwanted or bothersome" in which people would "feel a heightened sense of fear or alarm, or might wish especially to be left alone."

Panhandlers are also provided with reasonable alternative avenues to solicit funds. Panhandling is defined as a solicitation made in person upon any street, public place, or park in which a person requests an immediate donation of money or other gratuity. Individuals are free to directly ask for money during the day so long as they do not violate the ordinance. In addition, individuals have the right during the daytime or evening hours to engage in "passive panhandling" in which they display signs or engage in street performances during the evening.

The Seventh Circuit also dismissed the contention that the ordinance was void for vagueness. For instance, the contention that a polite request for a donation might be considered threatening by an unusually sensitive or fearful individual and that a panhandler would not be certain on how to conform to the ordinance according to the court was answered by the provision of a "reasonable person" standard in the ordinance. In another example, the court ruled that the prohibition on "following" an

individual should be viewed as entailing a continuing request for a donation combined with following an individual. Walking in the same direction as the solicited person, as a result, would not be prohibited where the walking was "divorced from the request." Do you agree that it is possible to distinguish between "aggressive" and "passive" panhandling? What additional provisions might you propose to this ordinance? Would you vote for this ordinance as a member of the Indianapolis City Council? See *Gresham v. Peterson,* 225 F.3d 899 (7th Cir. 2000). A federal district court decision ruling the Chicago Municipal Code provision on panhandling unconstitutional is *Thompson and Others v. City of Chicago,* WL 31115578 (N.D. Ill. 2002).

Gangs

It is estimated that that there are roughly 21,000 gangs active in the United States with an estimated 700,000 gang members. Gangs are no longer limited to large urban areas and today are active in nearly every city, suburb, and rural area. These gangs are involved in criminal activity ranging from drugs and prostitution, to extortion and theft, and some have members throughout the United States as well as in Mexico and Central America. The Illinois legislature made several legislative "findings" concerning the peril posed by gangs.

- Urban, suburban, and rural communities are being "terrorized and plundered by street gangs."
- Street gangs are often "controlled by criminally sophisticated adults" who manipulate or threaten young people into serving as drug couriers and into carrying out brutal crimes on behalf of the gang.
- Street gangs present a "clear and present danger to public order and safety."

An example is the Varrio Sureno Town gang that was described by the California Supreme Court, in the 1997 case of *Gallo v. Acuna,* as having converted the four-square-block neighborhood of Rocksprings in San Jose, California, into an "urban war zone." The gang was described as congregating on sidewalks and lawns and in front of apartment complexes at all hours. They openly drank, smoked dope, sniffed glue, snorted cocaine, and transformed the neighborhood into a drug bazaar. The court's opinion described drive-by shootings, vandalism, arson, and theft as commonplace. Garages were used as urinals; homes were "commandeered as escape routes" and served as storage sites for drugs and guns; and buildings, sidewalks, and automobiles were "turned into a . . . canvas of gang graffiti." The California Supreme Court concluded that community residents had become "prisoners in their own homes." Individuals wearing the color of clothing identified with rival gangs were at risk, and relatives and friends were reluctant to visit. Verbal and physical retaliation was directed against anyone who complained to the police or who served as an informant.[22]

States have adopted various legal approaches to controlling gangs. Special gang statutes make it a crime to solicit, to cause any person to join, or to deter any person from leaving a gang, and enhanced punishment is provided for crimes committed to further the interests of gangs. Gang members have also been prosecuted under organized crime statutes, and laws also provide for the vicarious civil liability of parents for the conduct of their children. Various school districts prohibit the display of gang paraphernalia and colors, and some correctional systems provide rewards for gang members who leave the gang and cooperate with authorities. In 2009, the City of Los Angeles successfully sued and collected a multimillion-dollar judgment for damages against individual gang members.

Gallo v. Acuna is an example of the type of innovative civil remedies that are being employed. In *Gallo,* the California Supreme Court affirmed an injunction (a court order halting certain acts) issued by a California trial court. The order declared the Varrio Sureno Town gang a "public nuisance," meaning that the gang's continued presence in the community prevented residents from the enjoyment of life and property, disrupted the quiet and security of the neighborhood, and interfered with the use of the streets and parks. Thirty-eight members of the gang were ordered to "abate" (end) the nuisance by halting conduct ranging from spray painting to the possession and sale of drugs and the playing of loud music, public consumption of alcohol, littering, urinating in a public place, communicating through the use of gang signals, and wearing gang insignia. An individual or group violating the injunction would be in contempt of court and subject to punishment by a fine or short-term incarceration.

Critics of these antigang efforts question whether we are sacrificing the civil liberties of both gang members and innocent young people in order to combat the violence perpetrated by a relatively small number of individuals. They point to the fact that young minority males who, in fact, may not be gang members are often targeted for harassment, detention, interrogation, and arrest by the police.

One of the most significant efforts to curb gang activity was the gang ordinance adopted by the Chicago City Council in 1992. This local law authorized the police to order suspected gang members who, along with at least two other individuals, were "loitering" in public to vacate the area. Between 1992 and 1995, the police issued 89,000 orders to disperse and arrested more than 42,000 people for disobeying an order to move on. In *City of Chicago v. Morales,* the U.S. Supreme Court considered the constitutionality of the ordinance. In reading the case, do you understand what type of behavior is prohibited under the ordinance? How do we balance the constitutional right of freedom of assembly against society's interest in combating gangs? Do you think that this type of ordinance is an effective approach to preventing gangs from terrorizing neighborhoods?

Should individuals reasonably believed by the police to be gang members have the right to assemble on street corners?

City of Chicago v. Morales, *527 U.S. 41 (1999), Opinion by: Stevens, J.*

Issue

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Facts

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug-related crimes. It noted that in many neighborhoods throughout the city, "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." Furthermore, the council stated that gang members "establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present. . . ." It further found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear." Moreover, the council concluded that the city "has an interest in discouraging all persons from loitering in public places with criminal gang members."

The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member." Second, the persons must be "loitering," which the ordinance defines as "remaining in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

The ordinance states in pertinent part:

> (1) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(2) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(3) As used in this section:

(a) "Loiter" means to remain in any one place with no apparent purpose.

(b) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(c) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

(4) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service. . . .

Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92–4 to provide guidelines to govern its enforcement. That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, and establish detailed criteria for defining street gangs and membership in such gangs. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated areas." The City, however, does not release the locations of these "designated areas" to the public.

During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance, but eleven others ruled that it was invalid. In respondent Youkhana's case, the trial judge held that the "ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police."

The City believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by twenty-six percent. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose eleven percent. However, gang-related homicides fell by nineteen percent in 1997, over a year after the suspension of the ordinance. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy. . . .

Reasoning

The basic factual predicate for the City's ordinance is not in dispute. As the City argues in its brief, "the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." The findings in the ordinance explain that it was motivated by these concerns. We have no doubt that a law that directly prohibited such intimidating conduct would be constitutional, but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

In fact, the City already has several laws that serve this purpose. . . . Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance before the Chicago City Council, testified that ninety percent of the conduct people complained that they were being arrested for was actually a criminal offense for which people could be arrested even absent the gang ordinance. These offenses included intimidation, criminal drug conspiracy, and mob action.

We are confronted at the outset with the City's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. . . . An enactment . . . may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. . . . As the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to move from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. . . . Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" or

the right to move "to whatsoever place one's own inclination may direct."

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . ." The Illinois Supreme Court recognized that the term *loiter* may have a common and accepted meaning, but the definition of that term in this ordinance—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose? . . . "The purpose simply to stand on a corner cannot be an 'apparent purpose' under the ordinance; if it were, the ordinance would prohibit nothing at all."

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering" but rather about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm. Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term *loitering* with a second specific element of the crime.

One of the trial courts that invalidated the ordinance gave the following illustration: "Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone."

The City's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "Whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do." We find this response unpersuasive for least two reasons.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. . . . The police are able to decide arbitrarily which members of the public they will order to disperse. Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." Both terms "are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles."

Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." . . . This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." . . .

The broad sweep of the ordinance also violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without

first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." As we discussed in the context of fair notice, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

Nevertheless, the City disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving—that is, to activity that would not constitute loitering under any possible definition of the term—does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance. Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Presumably, an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive. . . .

It is true, as the City argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. That the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

Holding

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." However, in this instance, the City has enacted an ordinance that affords too much

discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, the judgment of the Supreme Court of Illinois is affirmed.

Dissenting, *Scalia, J.*

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose—to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated in public places to deal in drugs and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem, it was worth restricting some of the freedom that they once enjoyed. The means they took was similar to the second, and more mild, example given above rather than the first: Loitering was not made unlawful, but when a group of people occupied a public place without an apparent purpose and in the company of a known gang member, police officers were authorized to order them to disperse, and the failure to obey such an order was made unlawful. The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

The majority today invalidates this perfectly reasonable measure . . . by elevating loitering to a constitutionally guaranteed right and by discerning vagueness where, according to our usual standards, none exists. . . . Respondent Jose Renteria—who admitted that he was a member of the Satan Disciples gang—was observed by the arresting officer loitering on a street corner with other gang members. The officer issued a dispersal order, but when she returned to the same corner fifteen to twenty minutes later, Renteria was still there with his friends, whereupon he was arrested. In another example, respondent Daniel Washington and several others—who admitted they were members of the Vice Lords gang—were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using the sidewalks. The arresting officer issued a dispersal order, issued another dispersal order later when the group did not move, and finally arrested the group when they were found loitering in the same place still later. Finally, respondent Gregorio Gutierrez—who had previously admitted to the arresting officer his membership in the Latin Kings gang—was observed loitering with two other men. The officer issued a dispersal order, drove around the block, and arrested the men after finding them in the same place upon his return. . . .

In our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected . . . all sorts of perfectly harmless activity by millions of perfectly innocent people can be forbidden—riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved. . . . All of these acts are entirely innocent and harmless in themselves, but because of the risk of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

Dissenting, *Thomas, J.*

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. . . . Nor does it violate the Due Process Clause. . . .

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have "virtually overtaken certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents." Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. . . .

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. Many of these criminal incidents and homicides result from gang "turf battles," which take place on the public streets and place innocent residents in grave danger. . . . In 1996 alone, gangs were involved in 225 homicides, which was twenty-eight percent of the total homicides committed in the city. . . . Nationwide, law enforcement officials estimate that as many as 31,000 street gangs, with 846,000 members, exist. . . .

Following . . . [their] hearings, the Chicago City Council found that "criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas." It further found that the mere presence of gang members "intimidates many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." It is the product of this democratic process—the council's attempt to address these social ills—that we are asked to pass judgment upon today.

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle that the police have the duty and the power to maintain the public peace and, when necessary, to disperse groups of individuals who threaten it. . . .

I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the possibility that a police officer . . . might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should not turn on the proposition that such an event will be anything but rare. An individual is always free to challenge the constitutionality of an arrest in court.

The . . . conclusion that the ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted is similarly untenable. There is nothing "vague" about an order to disperse. . . . It is safe to assume that the vast majority of people who are ordered by the police to "disperse and remove themselves from the area" will have little difficulty understanding how to comply.

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer . . . are . . . people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described, "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens . . . "freedom of movement." And that is a shame. I respectfully dissent.

Questions for Discussion

1. Summarize Chicago's Gang Congregation Ordinance.
2. The majority concludes that the ordinance fails to provide both citizens and the police with clear guidelines and is unconstitutionally void for vagueness. By reading the law, would you know what conduct is prohibited? As a police officer, would it be clear under what circumstances you were authorized to order people to disperse?
3. Why is the ordinance void for vagueness?
4. Why does Justice Scalia take the time in his dissent to discuss the arrest of several individuals? How do Justices Scalia and Thomas balance civil liberties against public safety?
5. Do you believe that the Chicago Gang Congregation Ordinance is an effective approach to curbing gang activity?
6. As a member of the Chicago City Council, would you vote for the ordinance?

Cases and Comments

Chicago Gang Ordinance. On February 16, 2000, the Chicago City Council revised the 1992 Gang Congregation Ordinance. The amended ordinance defined "gang loitering" as remaining in any one place under circumstances "that would warrant a reasonable person" to believe that the purpose or effect of that behavior is to enable a criminal street gang "to establish control over identifiable areas, to intimidate others from entering these areas, or conceal illegal activities." The new ordinance authorizes the Superintendent of Police to designate areas of Chicago in which enforcement is required because "gang loitering has enabled street gangs to establish control over identifiable areas, to intimidate others from entering the areas or to conceal illegal activities" (Municipal Code of Chicago sections 8–4-015, 8–4-017). The revised ordinance has not yet been tested in court. How does this differ from the 1992 Gang Congregation Ordinance? Do you think that the revised 2000 law is constitutional? Are there other amendments that you would make to the ordinance?

The Overreach of Criminal Law

Criminologists Norval Morris and Gordon Hawkins, writing in 1969, argue that the function of criminal law is to protect property and persons, particularly juveniles and those in need of special protection. They point out that roughly fifty percent of all arrests are for acts threatening public morality. These, for the most part, are acts that individuals engage in voluntarily and do not view as harmful to themselves or to others. In other words, people are arrested who do not believe that they should be treated as criminals or victims and who are not deterred by the threat of either arrest or punishment. This list of victimless crimes includes drunkenness, narcotics, gambling, prostitution, the possession of obscene materials, and various sexual offenses. Some may include under the heading of victimless offenses, seatbelt and motorcycle helmet laws, adultery and fornication, and the prohibition on assisted suicide. Morris and Hawkins criticize what they view as the moralist orientation of American criminal law and the long tradition of employing the law as an instrument for coercing men and women into acting in a virtuous fashion. In their view, people possess a complete right to choose a path that may lead to purgatory so long as they do not directly injure the person or property of another. Morris and Hawkins also point to the fact that criminalizing consensual, private behavior actually increases rather than decreases crime.[23]

- *Crime Tariff.* Making an activity illegal means that those engaged in the activity do not confront competition from legal businesses and will be free to charge a high price. This profit, in turn, is used to fund other organized crime activities. Also, addicts must resort to crime to support their expensive gambling, drug, and alcohol addictions.
- *Inconsistency.* The condemnation of activities such as gambling is undermined by the fact that there are legal lotteries and gambling casinos in Atlantic City, in Las Vegas, and on Native American reservations. This creates an inconsistency in legal rules and contributes to a lack of respect for the law.
- *Romanticism.* Declaring an activity illegal tends to make it appear romantic and appealing to younger people.
- *Law Enforcement.* Scarce law enforcement resources are devoted to enforcing these laws rather than on more harmful offenses. Often, there are no complaining victims, and the police must resort to controversial undercover and sting operations. The amount of money involved in activities such as drug trafficking and the absence of complaining victims creates a situation with the potential for bribery, extortion, and corruption.
- *Criminal Subculture.* Making activities like gambling and prostitution illegal means that people involved in these activities are driven into a criminal environment and may be victimized or become involved in other crimes. Prostitutes often are exploited by pimps who offer protection and threaten customers.

This view is challenged by English Lord Patrick Devlin, who argues that society must be equally vigilant in protecting itself against threats from abroad and at home. Lord Devlin contends that the loosening of moral bonds is typically the first step toward the disintegration of the social order and that the maintenance of values is the proper concern of government. Lord Devlin argues that the notion that allegedly private behavior does not affect society is misguided. He concedes that while great social harm may not result from a single individual engaging in an alcoholic or gambling binge, society would crumble if the same activity is embraced by a quarter or more of the population. These so-called victimless crimes, according to Lord Devlin, impose hardships on the families of addicts, require society to spend money in treating addictions, corrupt the young, and ruin the lives of addicts. In short, a compassionate society does not permit individuals to "do their own thing." Lord Devlin concludes that we cannot, on the one hand, encourage people to live in a moral fashion and, on the other hand, tolerate immoral behavior. Where do you stand on the debate over so-called victimless crimes? Some studies have found an "epidemic" of illegal gambling by college students. Is this a "victimless crime"?[24]

The next section considers the **immorality crime** of prostitution, an activity that the famous British *Wolfenden Report* argued, in 1957, should not be subject to criminal punishment when carried on between consenting adults.

Prostitution and Solicitation

Prostitution is defined as engaging in sexual intercourse or other sexual acts in exchange for money or other items of value. You undoubtedly have heard someone refer to prostitution as "the world's oldest profession." Why is an activity that has been characteristic of both ancient and modern societies considered a crime? There are several reasons:

- *Disease.* Encourages transmission of infections such as AIDS.
- *Family.* Weakens marriage and the family.
- *Exploitation.* Exploits and degrades women.
- *Immorality.* Promotes social immorality and a culture tolerant of alcoholism, drug abuse, gambling, and acts of immorality.

Critics of laws punishing prostitution point out that the legitimacy of law enforcement is undermined by the fact that the police typically must resort to posing as "prostitutes" or "customers" in order to enforce prostitution laws and that this lowers respect for law enforcement. There is also an inconsistency in the fact that the police target street prostitutes while "call girls" who service the relatively wealthy are rarely arrested. Critics further note that despite the resources devoted to eliminating prostitution, the police have not been able to deter individuals from engaging in this activity. The argument is also made that categorizing prostitution as a crime insures that it will be controlled by organized crime and pimps (individuals who live off the proceeds of prostitution). This results in prostitutes being labeled as criminals, places them in danger, and deprives the government of tax revenues. Others argue that prostitution laws deprive women of the opportunity to utilize their bodies to advance their economic well-being. The most radical commentators point to the fact that prostitutes are no different than the large number of people who engage in sex with the intent of obtaining employment or material gain. Some favor decriminalization of prostitution and subjecting the practice to state regulation, the policy followed in the Netherlands. State regulation has the advantage of insuring that precautions are taken against the spread of HIV and other sexually transmitted diseases. A small number of commentators favor complete legalization.

Nevada is the only state in which prostitution is legal. Each county in the state is free to determine whether to permit prostitution, and the practice is heavily regulated. Brothels must pay a licensing fee, and prostitutes are required to submit to monthly HIV tests. Condoms are required, and prostitutes must be at least twenty-one years old. Prostitution is not permitted anywhere other than in the brothels, and the brothels may not advertise in counties in which the practice is illegal. Nevada possesses roughly thirty legal brothels that employ roughly 300 prostitutes.

The Crime of Prostitution

Prostitution punishes both men and women who

- solicit or engage in
- any sexual activity
- in exchange for money or other consideration.

As you can see, prostitution is committed by exchanging sexual activity for money or other consideration or by **solicitation for prostitution**, asking or requesting another person to engage in prostitution. Note that it is the solicitation or actual exchange of money or value for sex that distinguishes prostitution from the legal act of approaching another person for consensual sexual activity. The crime of prostitution is not limited to sexual intercourse and encompasses all varieties of sexual interaction. Georgia's prostitution law provides that a person "commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including but not limited to sexual intercourse or sodomy, for money or other items of value."[25]

Pennsylvania follows the Model Penal Code by providing that a person is guilty of prostitution who "is an inmate of a house of prostitution or otherwise engages in sexual activity as a business." An inmate is a person who engages in prostitution as a business in conjunction with a house of prostitution or as a "call girl," who makes use of an agency to obtain clients. An individual is guilty under this provision who engages in prostitution in affiliation with a house of prostitution. It is unnecessary to establish that the accused engaged in a specific act of prostitution.[26]

State statutes also commonly punish loitering for prostitution. California declares that it is "unlawful for any person to loiter in any public place with the intent to commit prostitution." An individual's *mens rea* is demonstrated by acts that indicate an intent to induce, entice, or solicit prostitution. The California statute notes that this intent may be established by the stopping and soliciting of pedestrians or of the occupants of passing automobiles. This type of provision recognizes that public loitering for solicitation is an essential step in engaging in the business of prostitution and that solicitation negatively impacts a neighborhood's sense of safety and stability.[27]

Prostitution statutes are gender neutral; prostitution may be committed by a male or female prostitute, and both prostitutes and customers may be guilty of soliciting or loitering for the purpose of prostitution. Several states explicitly punish a person who "hires a prostitute or any other person to engage in sexual activity . . . or if that person enters or remains in a house of prostitution for the purpose of engaging in sexual activity." Pennsylvania also provides that convictions and sentences for a second and all subsequent acts of prostitution shall be published in the newspaper.[28]

Another prostitution-related offense is **pimping**, which involves procuring a prostitute for another individual, arranging a meeting for the purpose of prostitution, transporting an individual to a location for the purpose of prostitution, receiving money or other thing of value from a prostitute knowing that it was earned from prostitution, or owning, managing, or leasing a house of prostitution or prostitution business. **Pandering** is the encouraging and inducing of another to become or remain a prostitute; this is punished more harshly when duress or coercion is employed.[29] **Living off prostitution** is committed by a person, other than a prostitute and the prostitute's minor child or other dependent, who is "knowingly supported in whole or substantial part by the proceeds of prostitution."[30] **Keeping a place of prostitution** involves "keeping a place of prostitution when [an individual] knowingly grants or permits the use of such place for the purpose of prostitution."[31] Pimping, pandering, and keeping a place of prostitution are also generally encompassed under the crime of **promoting prostitution**, which involves aiding or abetting prostitution by "any means whatsoever."[32] States also have extended their laws to criminally punish a "masseur or masseuse" who commits the offense of **masturbation for hire** when he or she "stimulates the genital organs of another, whether resulting in orgasm or not, by manual or other bodily contact exclusive of sexual intercourse or by instrumental manipulation for money or the substantial equivalent thereof."[33]

Prostitution is a misdemeanor. It is typically punished somewhat more severely for the third and subsequent offenses and is a felony in the event that an individual knew that he or she was infected with HIV. Georgia provides a sentence of between five and twenty years and a fine of up to $10,000 for keeping a place of prostitution, pimping, pandering, or solicitation involving an individual under eighteen years old.[34]

We should note in passing that there are several other misdemeanor sexual offenses that appear in various state statutes:

- ***Adultery.*** Consensual sexual intercourse between a male and a female, at least one of whom is married.
- ***Bigamy.*** Marrying another while already having a living spouse.
- ***Fornication.*** An unmarried person who engages in voluntary sexual intercourse with another individual.
- ***Lewdness.*** Public acts offending community standards, including the display of genitals, sexual intercourse, lewd sexual contact, and deviate sexual intercourse.

Legal Regulation of Prostitution

The difficulty of controlling prostitution through individual criminal prosecutions led the city of Milwaukee, Wisconsin, to obtain a court order declaring that prostitutes in designated areas of the city constituted a nuisance. A Wisconsin appellate court found that the police had received a high volume of complaints concerning prostitutes on the streets and private property in this neighborhood. The court further ruled that the enforcement of the laws against prostitution posed a danger to the police, who were forced to act undercover to apprehend prostitutes and that these officers were endangered by the fact that the prostitutes frequently carried sharpened objects, knives with long blades, and razors. The injunction issued by the court prohibited prostitutes from soliciting customers by stopping pedestrians and automobiles and from waiting at bus stops and pay phones and loitering in the doorways of businesses.[35]

The next case, *Harwell v. State,* illustrates the type of technical details that a court must examine to determine whether a defendant intentionally agreed to engage in sex for money.

The Statutory Standard

Model Penal Code

Section 251.2. Prostitution and Related Offenses

(1) A person is guilty of prostitution, a petty misdemeanor, if he or she:
   (a) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or
   (b) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

"Sexual activity" includes homosexual and other deviate sexual relations. A "house of prostitution" is any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another. An "inmate" is a person who engages in prostitution in or through the agency of a house of prostitution. "Public place" means any place to which the public or any substantial group thereof has access.

(2) Promoting Prostitution. . . . The following acts shall . . . constitute promoting prostitution:
   (a) owning, controlling, managing, supervising or otherwise keeping . . . a house of prostitution or prostitution business; or
   (b) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or
   (c) encouraging, inducing, or otherwise purposely causing another to become or remain a prostitute; or
   (d) soliciting a person to patronize a prostitute; or
   (e) procuring a prostitute for a patron; or
   (f) transporting a person into or within this state with the purpose to promote that person engaging in prostitution, or procuring or paying for transportation with that purpose; or
   (g) leasing or otherwise permitting a place controlled by the actor . . . to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable efforts to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or
   (h) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this Subsection.

(3) Grading of Offenses. An offense under Subsection (2) constitutes a felony of the third degree if:
   (a) the offense falls within paragraph (a), (b) or (c) of Subsection (2); or
   (b) the actor compels another to engage in or promote prostitution; or
   (c) the actor promotes prostitution of a child under 16. . . .
   (d) the actor promotes prostitution of his wife, child, ward or any person for whose care, protection or support he is responsible.

Otherwise the offense is a misdemeanor.

(4) Presumption From Living off Prostitutes. A person, other than the prostitute or the prostitute's minor child or other legal dependent incapable of self-support, who is supported in whole or substantial part by the proceeds of prostitution is presumed to be knowingly promoting prostitution. . . .

(5) Patronizing Prostitutes. A person commits a violation if he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

(6) Evidence. On the issue whether a place is a house of prostitution the following shall be admissible evidence: its general repute; the repute of the persons who reside in or frequent the place; the frequency, timing and duration of visits by non-residents. Testimony of a person against his spouse shall be admissible to prove offenses under this Section.

Was there an agreement to engage in sex for money?

HARWELL V. STATE, *821 N.E.2D 381 (IND. APP. 2004),* OPINION BY: RILEY, J.

Appellant-defendant, Lisa Harwell (Harwell), appeals her conviction for Count I, prostitution, a Class D felony. . . . We affirm.

Issue

Harwell raises one issue on appeal, which we restate as follows: whether the State presented sufficient evidence to sustain her conviction for prostitution.

Facts

On September 12, 2003, Officer David Miller of the Indianapolis Police Department was investigating prostitution complaints in the College corridor, the area between Washington Street and 38th Street, in Indianapolis, Indiana. His undercover investigation consisted of driving around the area looking for prostitutes. At approximately 2:45 P.M., Officer Miller observed Harwell on the corner of 22nd Street and College Avenue. Upon stopping at the side of the road, he inquired if Harwell needed a ride. Without responding, Harwell entered the car and asked Officer Miller if he was a police officer. After denying he was a police officer, Officer Miller asked her if anything was going on, a question he uses to determine if women are looking to commit sexual acts. He further specified he was looking for fellatio. Although Harwell agreed to perform fellatio, she refused to discuss money when he asked about the price. Instead, she directed him towards an alley off the 2100 block of Yandes. When they arrived in the alley, Officer Miller again questioned Harwell about the cost, asking her if the act would be more than $20.00. Harwell simply responded "no." At that point, Officer Miller informed her that he was a police officer and that she was under arrest.

On January 26, 2004, a bench trial was held. At the close of the evidence, the trial court found Harwell guilty of prostitution, a Class D felony and sentenced her to 545 days of incarceration at the Indiana Department of Correction.

Reasoning

Harwell contends that the evidence presented at trial was insufficient to support her conviction. Specifically, Harwell argues that the State failed to prove that she offered or agreed to perform a sexual act in exchange for money or other property. . . . Prostitution as a Class D felony is defined as "[a] person who knowingly or intentionally performed, or offers or agrees to perform, sexual intercourse or deviate sexual conduct . . . for money or other property commits prostitution, a Class A misdemeanor. However, the offense is a Class D felony if the person has two (2) prior convictions under this section." Thus, in order to convict Harwell, the State was required to establish beyond a reasonable doubt that (1) she intentionally agreed to perform fellatio in exchange for money and that (2) she had two prior convictions for prostitution. Although Harwell now concedes that she intended to engage in a sexual act, she disputes that there was an agreement to perform fellatio for money. In particular, she asserts that despite Officer Miller's repeated inquiries about the cost of fellatio, she never indicated that she agreed to accept money. We are not persuaded.

As both parties correctly point out, there is no definition of "agreement" within the statute. Furthermore, neither party proffered nor did our research reveal any case law clarifying "agreement" as used in the charge of prostitution. . . ."Agreement" has a plain, and ordinary meaning: it is defined by Black's law dictionary as "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." Analogizing to contract law, an agreement is considered to be a meeting of the minds between the parties, a mutual understanding of all terms of the contract. . . .

Here, the record shows that Officer Miller was conducting an undercover investigation in an area known for its high volume of prostitution. Testimonial evidence indicates that immediately after getting into Officer

Miller's car, Harwell demanded to know whether he was a police officer. Further, Officer Miller testified that after Harwell agreed to perform fellatio, she was evasive about its cost. However, the record reflects that after directing him to an alley, Officer Miller again attempted to elicit a specific price for Harwell's services. At this point, Officer Miller stated that upon his question "if it was going to cost more than $20.00," Harwell responded, "no."

Holding

Being mindful that we "should not be ignorant as judges of what we know as men," we find that the State presented sufficient evidence to prove beyond a reasonable doubt that Harwell agreed to perform fellatio for money. Based on the evidence before us, we conclude that the agreement was implicit in the parties' words and actions when considered in the context in which they occurred. By indicating that the sexual service would not be more expensive than $20.00, Harwell emitted an inference that there was a cost involved and that she would accept money.

Moreover, Harwell's argument that a specific price has to be determined between the parties prior to there being a meeting of the minds is not supported by the statutory language, which only requires evidence of a performance, offer, or agreement to commit sexual services in exchange for money. The statute is silent as to the requirement of a preset price. Surely, it cannot be said that to constitute a violation of the statute, the agreement must be expressed and in precise statutory language. Therefore, we agree with the trial court that a meeting of the minds existed between Officer Miller and Harwell that she would perform fellatio for money, with a more specific price to be determined somewhere between 1 penny and $20.00, but definitely not more than $20.00. . . . Consequently, we hold that the State presented sufficient evidence to support Harwell's conviction for prostitution.

Questions for Discussion

1. Did Harwell possess the intent to exchange sex for money? Can there be a legal agreement given that Officer Miller did not possess an intent to exchange sex for money?
2. Absent an agreement as to price, are we able to conclude that Harwell intended to exchange sex for money? Was her consent conditional on the amount of money offered by Officer Miller?
3. Do you believe that there was a "meeting of the minds or an agreement to exchange sex for money"?
4. Was Harwell, in reality, convicted for being a prostitute rather than for engaging in an act of prostitution?

Cases and Comments

1. ***Decriminalization.*** Audrey James, twenty-one, and Laverne McCray, twenty-three, were first offenders, arrested and charged with prostitution. Both were enrolled in business school and worked as prostitutes in order to pay their tuition. They filed a petition under a provision of New York criminal procedure requesting the judge to dismiss the charges "in the interests of justice." This motion was opposed by the District Attorney, despite the fact that first offenders were traditionally released without punishment. Judge Stanley Gartenstein of the Criminal Court of New York City noted that prostitution is a victimless crime that the law had proven unable to control. He observed that this was a testimony to the fact that "morality cannot be legislated." In addition, Judge Gartenstein noted that the "the real victim of prostitution is the prostitute herself and the real criminal, her pimp, who keeps her virtually enslaved" and asked whether it "might . . . be more productive to focus society's efforts on the parasite rather than the host." Judge Gartenstein concluded that the time each of the defendants already had spent in jail was sufficient to communicate that prostitution was "self-destructive and degrading." The traditional punishment of the assessment of a fine with the alternative of jail time for nonpayment merely increased dependency on pimps and drove women back to the streets to earn even more money. Releasing these two young women without penalty might save them from this self-perpetuating cycle of prostitution. Judge Gartenstein concluded by arguing that resources and money were being spent on prostitution and gambling offenses, which detracted from efforts to combat violent crime. The average cost for processing a prostitution case was $505.11, and for a gambling case, $625.78. This compared to $464.27 for a kidnapping and $470.49 for the average robbery. See *People v. James,* 415 N.Y.2d 342 (Crim. Ct. N.Y.C. 1979).

2. ***Payment.*** In *State v. Henderson,* the defendant approached a female undercover police officer who was working as a prostitution decoy and offered to exchange bubble gum for sex. The defendant was convicted and sentenced to six months' probation and fined $100. Henderson was convicted under a statute that prohibited solicitation of "another to engage . . . in sexual activity for hire." The appellate court concluded that "[i]n view of the statement Henderson made to officer St. Clair after he was arrested, the trial court could reasonably

find that Henderson made a serious, if unusual, offer to Briggs to engage in sex with him in exchange for some bubble gum." As the trial court noted, "bubble gum has economic value, even if that value is slight. . . . There is nothing . . . specifying the amount of compensation" required to constitute the offense of solicitation for prostitution. "Nor is there anything in the statute requiring that the proposed transaction be commercially reasonable." Do you agree? *State v. Henderson,* 2007 Ohio 5367 (Ohio App. 2007).

Obscenity

Until the eighteenth century, **obscenity** in England was punished before religious courts. In 1727, royal judges asserted jurisdiction over obscenity, asserting that possession of such material constituted an offense against the peace and weakened the "bonds of civil society, virtue, and morality."[36]

In *Roth v. United States,* the U.S. Supreme Court held that obscenity was not constitutionally protected speech or press within the First Amendment, reasoning that this form of expression is "utterly without redeeming social importance."[37] The lack of protection afforded to obscenity is based on several public policy considerations:

- *Protection of the Community.* A community is entitled to protect itself against threats to the moral fabric of society.
- *Antisocial Conduct.* Obscenity causes antisocial conduct.
- *Women.* Obscenity degrades women.
- *Communication.* Obscenity produces a sexual, rather than mental, response and is a form of sexual communication rather than the expression of ideas.

Crime in the News

On June 11, 2008, Larry Craig, U.S. Senator from Idaho, was arrested for the misdemeanor of disorderly conduct at Minneapolis–St. Paul International Airport after allegedly engaging in lewd conduct in a men's public restroom. Craig did not appear for trial and, instead, submitted a plea of guilty through the mail, and on August 8, 2008, Craig was fined $500 dollars and received a suspended ten-day jail sentence and one year of probation. The charge against Craig was particularly surprising. He was completing his third term in the U.S. Senate and was known as one of the most conservative and "antigay" politicians in Washington and was married with three grown children. Craig initially indicated that he would resign from the U.S. Senate but later defiantly announced that he would complete his term.

Craig had been arrested by plainclothes officer Sergeant David Karsnia, who was investigating complaints of sexual activity in the men's restroom of the Northstar Crossing in the Lindbergh Terminal. Karsnia seated himself in a stall and, after roughly thirteen minutes, spotted "an older white male with grey hair standing outside my stall." Craig stood about three feet from the stall, and the officer could see Craig stare into his stall, "fidget with his fingers, and then look through the crack in my stall again." Craig would "repeat this cycle for about two minutes," and the officer was able to see Craig's blue eyes as "he looked into my stall." The stall next to Karsnia eventually was vacated, and Craig entered the stall and placed his roller bag against the front of the stall door, blocking the public view. The officer then recorded that Craig tapped his right foot, a signal used by persons "wishing to engage in lewd conduct." Craig then tapped his toes several times and moved his foot closer to Karsnia's. Karsnia moved his foot "up and down slowly." Roughly a minute later, Craig reached into Karsnia's stall and repeated this swiping motion two more times. The officer then held his police identification down by the floor so that it was visible to Craig and pointed toward the exit. Craig exited the stall and was taken to the Police Operations Center. He then allegedly showed the officer his business card that identified him as a U.S. Senator and stated, "What do you think about that?" Craig denied most of the officer's allegations and stated that he could not recall other factual allegations. He explained that he had a "wide stance when going to the bathroom and that his foot may have touched" Karsnia's foot. He also stated that he had reached down with hand to pick up a piece of paper that was on the floor and that his hand may have inadvertently entered Karsnia's stall. Craig later pled guilty to disorderly conduct and signed a statement that he had engaged in "conduct which I knew or should have known tended to arouse alarm or resentment in others which conduct

was physical [versus verbal] in nature." The document clearly stated that "I now make no claim that I am innocent" of the charge and that he understood that the "court will not accept a plea of guilty from anyone who claims to be innocent."

Craig's guilty plea later came to the attention of the media, and he dismissed the accusation as "completely ridiculous" and with no "basis in fact." He also denied that he was gay, attempting to put to rest rumors that he had engaged in similar behavior in the past. Craig then filed a motion to withdraw his guilty plea he had entered before District Court Judge Gary Larson based on "manifest injustice." The motion indicated that he had been pressured into a guilty plea by the police, prosecutor, and court; that he had failed to seek legal advice when confronted with the allegations; and that he was innocent of the charges. Craig stated that he "overreacted" and pled guilty because he feared that the allegations would be made public at a time when newspapers were investigating his alleged homosexual activities. Hennepin County, Minnesota, District Court Judge Charles Porter dismissed the motion on the grounds that Craig had "accurately, voluntarily and intelligently" conceded his guilt and that it was too late to withdraw his plea. Judge Porter's ruling later was affirmed by a three-judge state court of appeals.

The Minnesota appellate court concluded that Craig was an individual of obvious sophistication and had freely and voluntarily entered a guilty plea after lengthy conversations with the prosecutor. The court noted that even if Craig's actions constituted expression under the First Amendment, that this speech was intrusive and invaded the privacy of a "captive audience" and was not protected under the First Amendment. Judge Edward Toussaint stated that the disorderly conduct statute necessarily was broad because it was directed at "any language or conduct that tends to arouse alarm, anger or resentment in others." Craig also had acknowledged in the written agreement that he had engaged in actions that he knew or should have known constituted a breach of the peace. The appellate court further concluded that there was no evidence that Karsnia had "partially invited" Craig's actions or that public authorities had pressured him into his plea.

Senator Craig has continued to deny his guilt and later apologized for his "misjudgment" in pleading guilty. Did Senator Craig engage in conduct that he knew or should have known would "tend to alarm, anger or disturb" others?

These assertions all have been challenged. For instance, the government *Report of the Commission on Obscenity and Pornography,* in 1970, concluded that exposure to explicit sexual materials does not play a significant role in causing delinquent or criminal behavior.

In *Miller v. California,* in 1973, the U.S. Supreme Court affirmed that obscene material is not protected by the First Amendment and established a three-part test for obscenity. Obscenity (as noted in Chapter 2) is defined as a description or representation of sexual conduct that taken, as a whole, by the average person applying contemporary community standards:[38]

- *Prurient Interest.* Appeals to the prurient interest in sex (an obsession with obscene, lewd, or immoral matters).
- *Offensive.* Portrays sex in a patently offensive way.
- *Value.* Applying a reasonable person standard, lacks serious literary, artistic, political, or scientific value when taken as a whole.

In *New York v. Ferber,* the U.S. Supreme Court held that **child pornography** could be prohibited despite the fact that the material did not satisfy the *Miller* standard. The Court upheld a New York law that prohibited the depiction of a child under sixteen years old in a "sexual performance," defined as engaging in actual or simulated sexual activity or the lewd display of the genitals. The sexual performance was considered criminal under the statute regardless of whether it possessed literary, artistic, political, or scientific value.[39]

It is illegal in every state to buy, sell, exhibit, produce, advertise, distribute, or possess with the intent to distribute obscene material or illegal child pornography. The offense of **lewdness** involves conduct that is obscene, such as willfully exposing the genitals of one person to another in a public place for the purpose of arousing or gratifying the sexual desire of either individual. **Indecent exposure** generally entails an act of public indecency, including sexual intercourse, exposure of the sexual organs, a lewd appearance in a state of partial or complete nudity, or a lewd caress or fondling of the body of another person.

Several municipalities have expanded the definition of obscenity to include other forms of communication that are considered harmful. An Indianapolis ordinance, for instance, was ruled

unconstitutional that prohibited the portrayal of women as sexual objects who enjoy pain or humiliation or who experience sexual pleasure in being raped or who are presented as sexual objects for domination or violation. The ordinance was ruled unconstitutional by the Seventh Circuit Court of Appeals, which held that Indianapolis was improperly penalizing speech based on the content of the message: Communication depicting women in the approved way was lawful no matter how sexually explicit, and speech portraying women in the unapproved way was unlawful whatever the literary or artistic value.[40]

In the next case in the text, *American Amusement Machine Association v. Kendrick,* the Seventh Circuit Court of Appeals considered the constitutionality of an Indianapolis ordinance regulating violent and sexually explicit video games based on evidence that exposure to these games is related to aggressive behavior by juveniles. Does the First Amendment protect materials that Indianapolis reasonably believes causes violent behavior by juveniles? Why must society wait until a young person commits a crime to intervene?

The Statutory Standard

Pennsylvania Statutes Section 5903. Obscene and Other Sexual Materials and Performances

(1) No person, knowing the obscene character of the materials or performances involved, shall:

- (a) display or cause or permit the display of any explicit sexual materials . . . in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare, or in any business or commercial establishment where minors . . . will probably be exposed to view all or any part of such material;
- (b) sell, lend, distribute, exhibit, give away or show any obscene material to any person 18 years of age or older or offer to sell, lend, distribute, transmit, exhibit or give away or show, or have in his possession with intent to sell, lend, distribute, transmit, exhibit or give away or show any obscene materials to any person 18 years of age or older, or knowingly advertise any obscene material in any manner;
- (c) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials;
- (d) write, print, publish, utter, or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had;
- (e) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity;
- (f) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this subsection;
- (g) knowingly take or deliver in any manner any obscene material into a State correctional institution, county prison, regional prison facility or any other type of correctional facility [other sections address possession of such material in a penal institution and permitting such material to enter any such institution]. . . .

(2) No person shall knowingly disseminate by sale, loan or otherwise explicit sexual materials to a minor . . . material which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

May Indianapolis limit the access of minors to violent video games?

American Amusement Machine Association v. Kendrick, *244 F.3D 572 (7TH CIR. 2001),* Opinion by: Posner, J.

The manufacturers of video games and their trade association seek to enjoin, as a violation of freedom of expression, the enforcement of an Indianapolis ordinance that seeks to limit the access of minors to video games that depict violence. . . .

Facts

The ordinance defines the term *harmful to minors* to mean "an amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under" that age and contains either "graphic violence" or "strong sexual content." *Graphic violence,* which is all that is involved in this case (so far as appears, the plaintiffs do not manufacture, at least for exhibition in game arcades and other public places, video games that have "strong sexual content"), is defined to mean "an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement]."

The ordinance forbids any operator of five or more video-game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use "an amusement machine that is harmful to minors," requires appropriate warning signs, and requires that such machines be separated by a partition from the other machines in the location and that their viewing areas be concealed from persons who are on the other side of the partition. Operators of fewer than five games in one location are subject to all but the partitioning restriction. Monetary penalties, as well as suspension and revocation of the right to operate the machines, are specified as remedies for violations of the ordinance.

Issue

The ordinance was enacted in 2000 but has not yet gone into effect, in part because we stayed it pending the decision of the appeal. The legislative history indicates that the City believes that participation in violent video games engenders violence on the part of the players, at least when they are minors. The City placed in evidence videotapes of several of the games that it believes violate the ordinance.

Although the district judge agreed with the plaintiffs that video games, possibly including some that would violate the ordinance, are "speech" within the meaning of the First Amendment and that children have rights under the Free Speech Clause, he held that the ordinance would violate the amendment only if the City lacked "a reasonable basis for believing the Ordinance would protect children from harm." He found a reasonable basis in a pair of empirical studies by psychologists, which found that playing a violent video game tends to make young persons more aggressive in their attitudes and behavior, and also in a larger literature finding that violence in the media engenders aggressive feelings.

Reasoning

The main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is offensive. A work is classified as obscene not upon proof that it is likely to affect anyone's conduct but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity. Obscenity is to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting, but it generally is not believed to inflict temporal (as distinct from spiritual) harm; or at least the evidence that it does is not generally considered as persuasive as the evidence that other speech that can be regulated on the basis of its content, such as threats of physical harm, conspiratorial communications, incitements, frauds, and libels and slanders, inflicts such harm. There are people who believe that some forms of graphically sexual expression, not necessarily obscene in the conventional legal sense, may incite men to commit rape or to disvalue women in the workplace or elsewhere, but that is not the basis on which obscenity has traditionally been punished. No proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity. Offensiveness is the offense. . . .

But offensiveness is not the basis on which Indianapolis seeks to regulate violent video games. Nor could the ordinance be defended on that basis. The most violent game in the record, *The House of the Dead,* depicts zombies being killed flamboyantly, with much severing of limbs and effusion of blood; but so stylized and patently fictitious is the cartoon-like depiction that no one would suppose it "obscene" in the sense in which a photograph of a person being decapitated might be described as

"obscene." It will not turn anyone's stomach. The basis of the ordinance, rather, is a belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence.

This is a different concern from that which animates the obscenity laws, though it does not follow from this that government is helpless to respond to the concern by regulating such games. Protecting people from violence is at least as hallowed a role for government as protecting people from graphic sexual imagery. The Constitution permits punishment of "fighting words," that is, words likely to cause a breach of the peace—violence. Such punishment is permissible "content based" regulation, and in effect, Indianapolis is arguing that violent video games incite youthful players to breaches of the peace. . . . As we'll see, no showing has been made that games of the sort found in the record of this case have such an effect. Nor can such a showing be dispensed with on the ground that preventing violence is as canonical a role of government as shielding people from graphic sexual imagery. The issue in this case is not violence as such, or directly; it is violent images; and here, the symmetry with obscenity breaks down. Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity.

There is a hint, though, that the City is also concerned with the welfare of the game-playing children themselves, and not just the welfare of their potential victims. This concern is implicit in the City's citation, which holds that potential harm to children's ethical and psychological development is a permissible ground for trying to shield them from forms of sexual expression that fall short of obscenity. . . . In the present setting, concern with the welfare of the child might take two forms. One is a concern with the potential psychological harm to children of being exposed to violent images and would be unrelated to the broader societal concern with violence that was the primary motivation for the ordinance. Another, subtler concern would be with the consequences for the child incited or predisposed to commit violent acts by exposure to violent images. . . .

If the community ceased to find obscenity offensive, yet sought to retain the prohibition of it on the ground that it incited its consumers to commit crimes or to engage in sexual discrimination, or that it interfered with the normal sexual development of its underage consumers, a state would have to present a compelling basis for believing that these were harms actually caused by obscenity and not pretexts for regulation on grounds not authorized by the First Amendment. We must consider whether the City of Indianapolis has . . . grounds for thinking that violent video games cause harm either to the game players or (the point the City stresses) to the public at large.

Children have First Amendment rights. . . . The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Youth, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

No doubt the City would concede this point if the question were whether to forbid children to read without the presence of an adult the *Odyssey,* with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants; or *The Divine Comedy* with its graphic descriptions of the tortures of the damned; or *War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds. Or if the question were whether to ban the stories of Edgar Allen Poe, or the famous horror movies made from the classic novels of Mary Wollstonecraft Shelley (*Frankenstein*) and Bram Stoker (*Dracula*). Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware. To shield children right up to the age of eighteen from exposure to violent descriptions and images would not only be quixotic but deforming; it would leave them unequipped to cope with the world as we know it.

Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own. Protests from readers caused Dickens to revise *Great Expectations* to give it a happy ending, and tourists visit sites in Dublin and its environs in which the fictitious events of *Ulysses* are imagined to have occurred. The cult of Sherlock Holmes is well known. Most of the video games in the record of this case, games that the City believes violate its ordinances, are stories. Take once again *The House of the Dead.* The player is armed with a gun—most fortunately, because he is being assailed by a

seemingly unending succession of hideous axe-wielding zombies, the living dead conjured back to life by voodoo. The zombies have already knocked down and wounded several people, who are pleading pitiably for help; and one of the player's duties is to protect those unfortunates from renewed assaults by the zombies. His main task, however, is self-defense. Zombies are supernatural beings, therefore difficult to kill. Repeated shots are necessary to stop them as they rush headlong toward the player. He must not only be alert to the appearance of zombies from any quarter; he must be assiduous about reloading his gun periodically, lest he be overwhelmed by the rush of the zombies when his gun is empty.

Self-defense, protection of others, dread of the "undead," fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young. *The House of the Dead* is not distinguished literature. Neither, perhaps, is *The Night of the Living Dead,* George A. Romero's famous zombie movie that was doubtless the inspiration for *The House of the Dead*. Some games, such as *Dungeons and Dragons,* have achieved cult status; although it seems unlikely, some of these games, perhaps including some that are as violent as those in the record, will become cultural icons. We are in the world of kids' popular culture. But it is not lightly to be suppressed.

Although violent video games appeal primarily to boys, the record contains, surprisingly, a feminist violent video game, *Ultimate Mortal Kombat 3*. A man and a woman are dressed in vaguely medieval costumes and wield huge swords. The woman is very tall, very fierce, and wields her sword effortlessly. The man and the woman duel, and the man is killed. Another man appears—he is killed too. The woman wins all the duels. She is as strong as the men, she is more skillful, more determined, and she does not flinch at the sight of blood. Of course, her success depends on the player's skill, and the fact that the player, whether male or female, has chosen to be the female fighter. (The player chooses which fighter to be.) But the game is feminist in depicting a woman as fully capable of holding her own in violent combat with heavily armed men. It thus has a message, even an "ideology," just as books and movies do.

We are not persuaded by the City's argument that whatever contribution to the marketplace of ideas and expression the games in the record may have the potential to make is secured by the right of the parent (or guardian, or custodian—and does that include a babysitter?) to permit his or her child or ward to play these games. The right is to a considerable extent illusory. The parent is not permitted to give blanket consent but must accompany the child to the game room. Many parents are too busy to accompany their child to a game room; most teenagers would be deterred from playing these games if they had to be accompanied by mom; even parents who think violent video games harmful or even edifying (some parents want their kids to develop a shooter's reflexes) may rather prevent their children from playing these games than incur the time and other costs of accompanying the children to the game room; and conditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights.

The City rightly does not rest on "what everyone knows" about the harm inflicted by violent video games. These games with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes. . . . The City . . . appeals to social science to establish that games such as *The House of the Dead* and *Ultimate Mortal Kombat 3,* games culturally isomorphic with (and often derivative from) movies aimed at the same under-eighteen crowd, are dangerous to public safety. The social science evidence on which the City relies consists primarily of the pair of psychological studies. . . . Those studies do not support the ordinance. There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments. It is highly unlikely that they are more harmful, because "passive" entertainment aspires to be interactive too and often succeeds. When Dirty Harry or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger. It is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy, but of that there is no evidence at all.

We can imagine the City's arguing that it would like to ban violent movies too, but that either this is infeasible or the City has to start somewhere and should not be discouraged from experimenting. Experimentation should indeed not be discouraged. But the City makes neither argument. Its only expressed concern is with video games, in fact only video games in game arcades, movie-theater lobbies, and hotel game rooms. It doesn't even argue that the addition of violent video games to violent movies and television in the cultural menu of Indianapolis youth significantly increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior. Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed. Tiny—and judging from the record of this case not very violent compared to what is available to children on television and in movie theaters today. The characters

in the video games in the record are cartoon characters, that is, animated drawings. No one would mistake them for photographs of real people. . . . The idea that a child's interest in such fantasy mayhem is "morbid"—that any kid who enjoys playing *The House of the Dead* or *Ultimate Mortal Kombat 3* should be dragged off to a psychiatrist—gains no support from anything that has been cited to us in defense of the ordinance.

Holding

The video games at issue in this case do not involve sex but instead a children's world of violent adventures. Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the commonsense reaction to the Indianapolis ordinance could be overcome by social scientific evidence but has not been. The ordinance curtails freedom of expression significantly and, on this record, without any offsetting justification, "compelling" or otherwise.

It is conceivable though unlikely that in a trial, the City can establish the legality of the ordinance. We need not speculate . . . what amendments might bring the ordinance into conformity with First Amendment principles. We have emphasized the "literary" character of the games in the record and the unrealistic appearance of their "graphic" violence. If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge.

Questions for Discussion

1. Summarize the Indianapolis ordinance.
2. How does Judge Richard Posner distinguish between the purpose behind the prohibition on obscenity and the purpose behind the Indianapolis video game ordinance?
3. Judge Posner argues that children have the First Amendment right to receive information that may be limited only for compelling reasons. What are the compelling reasons discussed by Judge Posner? Does Judge Posner believe that the City succeeded in documenting the negative impact of video games on children?
4. The ordinance permits parents to allow their children to view violent video games. Why does Judge Posner believe that parents will not adequately protect the First Amendment rights of children under the ordinance?
5. Judge Posner recognizes that there may be circumstances in which portrayals of violence may be prohibited. Do you agree that the law should prohibit some depictions of violence?
6. This judicial decision is based on Judge Posner's conclusion that video games are no more harmful than conventional books and films. Do you agree that the impact of a violent video game and the depiction of violence in a book or movie are similar? You might want to read the decision of a district court judge who disagrees with Judge Posner. See *Interactive Digital Software Association v. St. Louis County,* 200 F. Supp. 2d 1126 (E.D. Mo. 2002).
7. As a member of the Indianapolis City Council, would you have voted for this ordinance?

Cases and Comments

Trafficking of Women. International criminal gangs are estimated by the United Nations to generate $7 billion a year from the illegal trafficking of women. There are thought to be between 200,000 and 500,000 sex workers in Europe, two-thirds of whom are from Eastern Europe and the former Soviet Union and one-third from the developing world. The United States has estimated that between 14,500 and 17,500 individuals are trafficked into the country annually for sexual exploitation and forced labor. Globally, the estimate is that between 600,000 and 800,000 individuals are illegally transported across borders for various forms of exploitation. Most are from Africa and Latin America and the newly independent Baltic and Eastern European states. American studies indicate that roughly seventy percent of these individuals participate in the commercial sex trade. Europe, Asia, and the Pacific are the destination of roughly eighty percent of these individuals.

Women have experienced particularly high rates of unemployment and poverty in the collapsing economies and are susceptible to false promises of domestic and secretarial jobs in North America, Western Europe, Japan, and the United States. Once the women reach their destination, their passports are confiscated, and they are told that they must work to pay off the cost of their travel and other expenses. The women are typically sold by the traffickers to pimps and bar owners who, in turn, may resell them to other individuals in the sex trade. According to the United Nations, Asian prostitutes in North America and Japan can sell for as much as $20,000; African women have been sold for $8,000 in Belgium. The United Nations reports that Russian prostitutes in Germany can earn about $7,500 a month, most of which is kept by the pimp or bar owner.

Women who resist are typically subjected to beatings and rape. Escape is difficult for the women. They

typically lack language skills and money and may fear that in the event that they contact the police, they will be prosecuted for prostitution. Many of these women are from strict and conservative cultures and anticipate that in the event that the authorities send them home, they will suffer rejection and discrimination. The women find that there is little choice other than to cooperate with their captors and continue to risk contracting sexually transmitted diseases.

The American organization Human Rights Watch issued a report on the sex industry in Bosnia, formerly part of Yugoslavia. The report finds that women who managed to contact the police found themselves prosecuted for prostitution and that local authorities generally were connected with traffickers and shared in the profits and, as a consequence, took no action against the individuals who kidnapped and exploited the women.

In 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Countries that sign this agreement agree to prevent and combat trafficking, to protect and assist victims of trafficking, and to promote cooperation among states to meet these goals. States are to criminally punish traffickers and to consider providing support services for victims.

In 2000, the U.S. Congress passed the Victims of Trafficking and Violence Protection Act, which proclaims that the degrading institution of slavery continues in the world, including the sexual exploitation of women. The detailed law punishes by twenty years in prison individuals who provide or obtain the labor of another through threat of serious harm or restraint or who traffic in persons who are to be subjected to slavery or forced labor. Aggravated forced labor and sexual trafficking and the sexual trafficking of minors are subject to a punishment of up to life in prison. The Justice Department reports that in the two years following passage of the law, the government has charged, convicted, or secured sentences against sixty-five traffickers in fourteen sex-trafficking and abuse cases.

For an international perspective on this topic, visit the study site.

Cruelty to Animals

The crime of cruelty to animals is recognized as an offense against public order and decency. These laws were originally based on the belief that respect for animals helped to teach people to act with sensitivity and regard for their fellow citizens, particularly the most vulnerable members of human society. Today, laws against cruelty to animals also reflect the emotional attachment that people have toward their pets and other animals and the increasingly common belief that animals experience pleasure and pain and possess rights. Violence toward animals is also thought to encourage aggression toward human beings.

Were the defendants guilty of cruelty to a cat?

Hall v. Indiana, *791 N.E.2D 257 (IND. APP. 2003),* Opinion by: Sullivan, J.

Facts

The facts favorable to the jury's verdict reveal that while patrolling on December 30, 2000, Deputy Robert Olesky of the Madison County Sheriff's Department observed two men, later identified as the defendants, walking with long guns but not wearing "hunter orange" clothing. Concerned that the defendants might be in violation of hunting laws, Olesky pulled his patrol car to the side of the road and observed the defendants with binoculars. Chris was carrying a rifle and pointed it at something on the ground a short distance away, shooting approximately twenty times. Mark fired a shotgun twice, once at a short distance away and once at very close range, "pretty much just straight down towards its feet."

Olesky drove up to the defendants and discovered that they had been shooting at a cat. The cat had been hit numerous times and was dead. Olesky took possession of the rifle Chris had been using and eventually retrieved the shotgun from Mark as well, which was determined to be below the statutory minimum length. The State charged both defendants with cruelty to an animal and charged Mark with dealing in a sawed-off shotgun. Following a jury trial held on June 6, 2002, both defendants were found guilty as charged. The trial court entered judgment on the convictions and sentenced Chris to one year suspended and to be served on

probation. Mark was sentenced to three years incarceration, with six months executed and to be served in a work-release program and thirty months suspended and to be served on probation. . . .

Issue

The defendants claim that the evidence is insufficient to support their convictions for cruelty to an animal. The statute under which the defendants were charged reads in relevant part, "A person who knowingly or intentionally tortures, beats, or mutilates a vertebrate animal commits cruelty to an animal, a Class A misdemeanor." . . . Here, Chris was charged with knowingly or intentionally mutilating a vertebrate animal, to-wit: by firing approximately thirty (30) projectiles from a shotgun into the body of a carcass of a cat until the cat was dead and its corpse mutilated." . . .

Reasoning

The defendants' main argument is that there is insufficient evidence that they mutilated the cat as charged. In support of this contention, the defendants cite *Boushehry v. State,* 648 N.E.2d 1174 (Ind. Ct. App. 1995). In *Boushehry,* the defendant was charged and convicted of two counts of knowingly torturing or mutilating a Canadian goose resulting in the death of the goose. The facts leading to Boushehry's arrest and conviction were that he had instructed Jim Waugh to shoot geese. Waugh fired two or three shots from a .22 caliber rifle, killing one goose and wounding another. Boushehry then cut the wounded bird's throat to kill it.

Upon appeal, Boushehry claimed that there was insufficient evidence to establish that he or Waugh had either tortured or mutilated either bird. The State countered that the act of shooting the geese constituted mutilation. The *Boushehry* court held that the act of shooting the goose, which died instantly, was insufficient to support a conviction for cruelty to an animal. Specifically, the court wrote that one goose died instantly and that there was no evidence presented at trial that either Boushehry or Waugh tortured or mutilated the goose in achieving its death. The act of shooting the goose was not considered enough alone to establish cruelty to an animal by either torture or mutilation. Because Boushehry was charged with only the torturing or mutilation death of the geese, his conviction for cruelty to an animal based on the death of the goose who died from the gunshot, absent evidence that the goose was tortured or mutilated, was not sustained.

As to the conviction based upon the death of the other goose, the court held that the evidence was sufficient to support the conviction. The court held that Boushehry's act of slitting the wounded bird's throat "constituted mutilation in its plain, or ordinary and usual, sense."

Because the statute does not define *mutilate,* we take the term in its plain, or ordinary and usual, sense. Webster defines *mutilate* as "to cut off or permanently destroy a limb or essential part of . . ." and "to cut up or alter radically so as to make imperfect." In the case at bar, the evidence most favorable to the conviction reveals that unlike the first goose in *Boushehry,* the cat here did not die instantly; instead, the cat was shot numerous times. Although shooting an animal once and killing it instantaneously does not constitute mutilation, here, the evidence most favorable to the verdict reveals that Chris shot at the cat approximately twenty times with a rifle, and Mark shot at the cat twice with a shotgun. Although there is no direct evidence on precisely how many times the cat was struck, the testimonial and photographic evidence reveals that the cat was hit multiple times.

Holding

A reasonable jury could conclude that the cat was mutilated, i.e., altered radically so as to be made imperfect. . . . This is not to say that every act of shooting an animal more than once is mutilation, but instead that given the circumstances of this case, the jury could reasonably conclude that the defendants' acts constituted mutilation in its plain and ordinary sense.

The defendants also claim that they presented uncontested evidence that they shot the cat to protect Mark's person and property and to prevent the cat from prolonged suffering. This is simply an invitation to reweigh evidence and judge witness credibility, a task within the province of the jury. The judgment of the trial court is affirmed.

Dissenting, *Baker, J.*

The first time I went rabbit hunting—and the next to last—I was accompanied by an accomplished sportsman and family friend who was undoubtedly perturbed at how long I stalked my prey before discharging my shotgun in the direction of the poor wretch. As I was too close to the creature, we found little more of my quarry than the tail. Was that felony mutilation? I think not.

Although the majority opines that multiple shots will not necessarily constitute mutilation, it maintains that it possibly could. While I do not condone shooting cats, in this instance, it was not otherwise illegal. The rapidity with which Chris and Mark dispatched the feline demonstrates that other than being either incompetent marksmen or intending to quickly destroy the pitiful animal, their acts were not such as prohibited by statute. Thus, I would reverse their Class A misdemeanor convictions for cruelty to an animal.

Questions for Discussion

1. Why were the defendants convicted of animal cruelty? At what point in their shooting of the cat was their conduct transformed from legal to illegal?
2. How does the court distinguish the facts in *Hall* from *Boushehry?*
3. Should there be a statutory provision prohibiting shooting cats? Several states are experiencing an "epidemic" of feral cats and are considering legalizing the killing of "wild cats." Animal groups favor capturing and neutering feral cats.
4. Was this a victimless crime?
5. How can we process animals for food consumption and eat meat and at the same time punish cruelty to animals?
6. Do you agree with the majority or dissenting opinion?

Chapter Summary

Crimes against public order and morals have traditionally been viewed as of secondary importance. These misdemeanor offenses are disposed of in summary trials and carry modest punishments. Offenses such as disorderly conduct, however, constitute a significant percentage of arrests and prosecutions, and the treatment of these arrestees helps to shape perceptions of the criminal justice system.

Crimes against public order and morals were historically used to remove the unemployed and political agitators from cities and towns. Today, we are seeing a renewed emphasis on these offenses by municipalities. An increasing number of middle-class individuals are moving into urban areas and find themselves sharing their neighborhood with prostitutes, drug addicts, alcoholics, and gangs. The so-called broken windows theory reasons that the tolerance of small-scale, quality-of-life crimes leads to neighborhood deterioration and facilitates the growth of crime.

Individual disorderly conduct is directed at a broad range of conduct that risks or causes public inconvenience, annoyance, or alarm and risks causing or does cause a breach of the peace. The Model Penal Code punishes engaging in fighting or threatening violent behavior; creating unreasonable noise, offensive utterances, or gestures; or creating a hazardous or physically offensive condition. A riot is group disorderly conduct and entails participating with others in tumultuous and violent conduct with the intent of causing a grave risk of public alarm.

The broken windows theory of crime, as you recall, is based on the belief that public indecencies or quality-of-life crimes lead to neighborhood deterioration and result in an increased incidence of crime. Two controversial quality-of-life crimes are vagrancy, defined in the common law as wandering the streets with no apparent means of earning a living, and loitering, a related offense that is defined at common law as standing in public with no apparent purpose. These broad statutes have historically been used against individuals based on their status as "undesirables." Vagrancy and loitering statutes have been found void for vagueness by the U.S. Supreme Court. Many states have responded by adopting the approach of the Model Penal Code and punish individuals whose conduct warrants "alarm for the safety of persons or property in the vicinity." Municipal ordinances directed against the homeless and gangs have been challenged as void for vagueness, and laws against the homeless also have been attacked as punishing individuals based on their economic status. These legal actions have generally proven unsuccessful.

Crimes against public order and decency have been criticized as punishing "victimless crimes," or consensual offenses that the individuals involved do not view as harmful. Other commentators argue that the law is properly concerned with private morality and challenge the notion that these offenses against public order and decency do not result in harm to individuals and to society. A particular object of debate is the criminalization of prostitution or the exchange of sexual acts for money or some other item of value. Obscenity is another offense that is claimed to be a victimless crime, which some claim creates social harm. There is particular controversy concerning efforts to extend obscenity to include depictions and descriptions of violence, particularly when directed to children. Another growing area of concern is the protection of animals.

Chapter Review Questions

1. List specific acts constituting disorderly conduct.
2. What is the difference between disorderly conduct and riot?
3. Distinguish between vagrancy and loitering.
4. What constitutional objections have been raised to vagrancy and loitering statutes?

5. What was the constitutional basis for the Supreme Court's holding Chicago's Gang Congregation Ordinance unconstitutional? Explain the reasoning of the Supreme Court.
6. What are the elements of the crime of prostitution?
7. How does the U.S. Supreme Court define obscenity?
8. Considering the cases you read on homelessness and gangs, does the broken windows theory pose a threat to civil liberties? Support your answer with examples from the textbook.
9. Why do some commentators argue that the criminal law is overreaching?
10. Are prostitution and soliciting for prostitution victimless crimes?
11. Define the legal standard for obscenity and child pornography.
12. Should individuals be held criminally liable for cruelty to "wild" animals?

Legal Terminology

adultery
bigamy
breach of the peace
broken windows theory
child pornography
crimes against public order and morality
crimes against the quality of life
disorderly conduct
fornication
immorality crimes
indecent exposure
keeping a place of prostitution
lewdness
living off prostitution
loitering
masturbation for hire
obscenity
pandering
pimping
promoting prostitution
prostitution
public indecencies
riot
rout
solicitation for prostitution
unlawful assembly
vagrancy

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Research state and local antigang legislation.
2. Consider the claim that homelessness is being "criminalized."
3. Compare cruelty-to-animal statutes in several states.

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American Law Institute, *Model Penal Code and Commentaries,* vol. 3, pt. 2 (Philadelphia: American Law Institute, 1980), pp. 309–523. A discussion of the common law background and various state statutes addressing offenses against public order and public decency.

Rollin M. Perkins and Ronald N. Boyce, *Criminal Law,* 3rd ed. (Mineola, NY: Foundation Press, 1982), pp. 453–498, 526–557. An introduction to the basic law of crimes against public order and morality.

16 Crimes Against the State

Were the paintball games preparation for terrorism or innocent fun?

By early summer, the paintball games were a regular occurrence every other weekend. Initially played at public courses, the games were moved to private farmland in Spotsylvania County. Because Abdur-Raheem, Chapman, and Surratt had prior military experience, they were asked to lead the paintball teams and train the players to improve their game. . . . [T]he defendants have tried to portray the paintball exercises as innocent fun. . . . [Were] these games . . . just an opportunity for outdoor exercise, fellowship, and an opportunity to improve self-defense skills, [or] preparation for real combat?

Core Concepts and Summary Statements

Introduction

The American colonists adopted a constitutional system intended to guard against the excesses of governmental power. However, the colonists also appreciated the need to prevent and to punish domestic threats to the government.

Treason

A. The drafters of the U.S. Constitution were aware of the need to protect the new democracy against attack and provided for the punishment of the crime of treason.
B. Treason is levying war against the United States or providing aid and comfort to the enemy.

Sedition

Sedition is conspiring to overthrow or to destroy the government of the United States, committing other violent acts against the United States, or calling for the immediate resort to armed force against the United States.

Sabotage

A. Sabotage is the intentional injury, destruction, or contamination of war material with the intent to impede or the knowledge that the acts may impede the carrying out or preparation for war or national defense by the United States or an allied nation.
B. Sabotage in peacetime is the intentional injury, destruction, or contamination of national defense material with the intent to impede the national defense.

Espionage

Espionage is the giving of information to a foreign government with the intent or reason to believe that it will to be used to injure the United States or to the advantage of a foreign country. A mere intent to convey information is sufficient in wartime.

Terrorism

A. Federal law defines international and domestic terrorism. Such acts must be intended to intimidate or coerce a civilian population, to influence government policy, or to affect the conduct of government.
B. Various criminal acts committed abroad against a national of the United States are punished under federal law.
C. Criminal acts transcending national boundaries (committed partially abroad and partially in the United States) are punishable under federal law.
D. The threat, use, or conspiracy to use weapons of mass destruction within the United States or against an American citizen abroad is punishable under federal law.
E. Various criminal acts directed against mass transportation systems and the harboring and concealing of terrorists are federal offenses.
F. Federal law makes it a crime to intentionally or knowingly provide material support for acts of criminal violence or to foreign terrorist organizations.
G. Virtually every state has adopted a terrorism statute.

Introduction

A significant percentage of the Europeans who settled in the American colonies were fleeing religious or political persecution and understandably developed a suspicion of government. This distrust was enhanced by the colonists' unhappy experiences with the often-repressive policies of the British authorities. There was almost uniform agreement to build the new American democracy on a foundation of strong limits on official authority along with a commitment to individual freedom. The colonists were also reluctant to adopt the type of harsh legislation that had been used by English monarchs to stifle dissent and criticism. Nevertheless, there was the reality that the United States confronted a threat from European countries eager to acquire additional territory in North America. A number of Americans and most Canadians also continued to harbor deep loyalties to England. This dictated that the United States put various laws in place to protect the government and people from attack. In this chapter, we examine these **crimes against the state:**

- *Treason.* Involvement in an attack on the United States.
- *Sedition.* A written or verbal communication intended to create disaffection, hatred, or contempt toward the U.S. government.
- *Sabotage.* Destruction of national defense materials.
- *Espionage.* Conveying information to a foreign government with the intent of injuring the United States.

Recent events have also led to the development of various counterterrorist laws, including the punishment of materially assisting terrorism. In reading about these counterterrorism offenses, you will see that these statutes are a modern and updated version of treason, sedition, sabotage, and espionage.

Treason

English royalty prosecuted and convicted critics of the monarchy for **treason**. Monarchs intentionally avoided writing down the requirements of treason in a statute in order to permit the crime to be applied against all varieties of critics. Parliament was finally able to mobilize enough power in 1352 to limit the power of the king and forced Edward III to agree to a Declaration Which Offenses Shall Be Adjudged Treason.

British officials in the American colonies applied the law on treason against rebellious servants and government critics, who typically were punished by "drawing and hanging." The drafters of the U.S. Constitution harbored bitter memories of the abusive use of the law on treason against critics of the colonial regime. At the same time, the drafters of the U.S. Constitution were conscious of the need to protect the newly independent American states against the threat posed by individuals whose loyalty remained with England and against European states that desired to expand their territorial presence in North America.

How could these various concerns be balanced against one another? The decision was made for the Constitution to clearly set forth the definition of treason, the proof necessary to establish the offense, and the appropriate punishment. James Madison explained in the *Federalist Papers* that as "new-fangled and artificial treasons have been the great engines by which violent factions . . . have usually wreaked their . . . malignity on each other, the convention have, with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime. . . ."[1] Article III, Section 3 of the U.S. Constitution provides that treason against the United States "shall consist only in levying War against them, or in adhering to their Enemies giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act or on Confession in open Court." Congress is also constitutionally prohibited from adopting the policy practiced in England of extending penalties beyond the individual offender to members of his or her family.

In summary, the United States adopted a law against treason while clearly limiting the definition of the offense in the Constitution.

Criminal Act and Criminal Intent

Treason is the only crime defined in the U.S. Constitution. Treason against the United States is a federal crime and may not be prosecuted by the states. Various states, such as California, prohibit treason against the state government.

The Constitution limits the *actus reus* of treason to individuals engaged in armed opposition to the government or in providing aid and comfort to the enemy.

- Levying war against the United States.
- Giving aid and comfort to the enemy.

Supreme Court Justice Robert Jackson, in *Cramer v. United States,* clarified that levying war consists of taking up arms and that giving aid and comfort involves concrete and tangible assistance. Justice Jackson stressed that a citizen may "intellectually or emotionally" favor the enemy or may "harbor sympathies or convictions disloyal" to the United States, but absent the required *actus reus,* there is no treason. He explained that an individual gives aid and comfort to the enemy by such acts as fomenting strikes in defense plants, charging exorbitant prices for essential armaments, providing arms to the enemy, or engaging in countless other acts that "impair our cohesion and diminish our strength."[2]

In a treason prosecution of sailors who seized, equipped, and armed a ship with the intent of attacking the federal government, Supreme Court Justice Joseph Fields observed that treason may be directed to the overthrow of the U.S. government throughout the country or only in certain states or in selected localities.[3] There is also no requirement that the enemy be shown to have benefited by the assistance provided by the accused.

The Constitution requires that treason be clearly established by the prosecution. This protects individuals against convictions based on passion, prejudice, or false testimony.

- Two witnesses must testify that the defendant committed the same overt act of treason, or
- the accused must make a confession in open court.

The *mens rea* of treason is an "intent to betray" the United States. Justice Jackson observed that "if there is no intent to betray there is no treason." Proof of the defendant's treasonous intent is not limited to the testimony of two witnesses. The required intent may be established by the testimony of a number of witnesses concerning the defendant's statements or behavior. Do not confuse motive with intent. An act that clearly assists and is intended to assist the enemy is treason, despite the fact that the defendant may be motivated by profit, anger, or personal opposition to war rather than by a belief in the justice of the enemy's cause.

In *Cramer,* Justice Jackson cautioned that treason is "one of the most intricate of crimes" and that the U.S. Constitution "gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. . . . The little clause is packed with controversy and difficulty."

Prosecuting Treason

The United States has brought only a handful of prosecutions for treason, and most offenders have had their death sentences modified or have received full pardons from the president. Courts have also been vigilant in insuring that the rights of defendants are protected. Justice Jackson observed that the United States has "managed to do without treason prosecutions to a degree that probably would be impossible except [where] a people was singularly confident of external security and internal stability."

Cramer v. United States, in 1945, is the most important treason case decided by the U.S. Supreme Court. A team of eight German saboteurs was transported across the Atlantic in two submarines and secretly put ashore in New York and Florida with the intent of engaging in acts of sabotage designed to impede the U.S. war effort and to undermine morale. Saboteurs Werner Thiel and Edward Kerling contacted a former friend of Thiel's in New York, Anthony Cramer. Cramer was subsequently charged and convicted of treason. His conviction was based on the testimony of two FBI agents who alleged that the three suspects drank together and engaged in long and intense conversation. The U.S. Supreme Court reversed Cramer's conviction based on the government's failure to establish an overt act that provided aid and comfort to the enemy. There was no indication

that Cramer provided aid and comfort to the enemy by providing information; by securing food, shelter, or supplies; or by offering encouragement or advice. In summary, "without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to Thiel and Kerling as enemies or how it strengthened Germany or weakened the United States in any way whatever."

The Legal Equation

Treason = Overt act of levying war against the United States or giving aid and comfort to the enemies of the United States

\+ intent to betray the United States

\+ two witnesses to an overt act of levying war or giving aid or comfort or confession in open court.

Did radio broadcasts on behalf of the enemy constitute treason?

Iva Ikuko Toguri D'Aquino v. United States, *192 F.2D 338 (9TH CIR. 1951), Opinion by: Pope, J.*

Facts

Appellant was convicted of treason against the United States. The indictment charged that she adhered to the enemies of the United States giving them aid and comfort by working as a radio speaker, announcer, script writer, and broadcaster for the Imperial Japanese Government and the Broadcasting Corporation of Japan, between November 1, 1943, and August 13, 1945; that such activities were in connection with the broadcasting of programs specially beamed and directed to the American Armed Forces in the Pacific Ocean area; and that appellant's activities were intended to destroy the confidence of the members of the Armed Forces of the United States and their allies in the war effort, to undermine and lower American and Allied military morale, to create nostalgia in their minds, to create war weariness among the members of such armed forces, to discourage them, and to impair the capacity of the United States to wage war against its enemies. The indictment alleged the commission of eight overt acts. Appellant was found guilty of the commission of overt act No. 6 only, which in the language of the indictment was: "That on a day during October, 1944, the exact date being to the Grand Jurors unknown, said defendant, at Tokyo, Japan, in a broadcasting studio of the Broadcasting Corporation of Japan, did speak into a microphone concerning the loss of ships." . . .

The record discloses that at the time of the commission of overt act No. 6, of which appellant was found guilty, she was unquestionably a citizen of the United States. She was born and educated in the United States, and a few months prior to the outbreak of the war with Japan she had gone to Japan for the purpose of studying medicine. Previously, she had received a college degree and had taken postgraduate work in a California university. Shortly before the outbreak of the war, she applied for a passport to return to the United States and was advised by the State Department that the passport was denied on the ground that her citizenship was not proven (she had traveled to Japan upon a "certificate of identification"). She endeavored to get clearance to board a ship scheduled to sail for the United States on December 2, 1941, but was unsuccessful. Early in 1942, she applied for evacuation through the Swiss Legation, but encountering difficulties in procuring certification of her United States citizenship, she abandoned this attempt. Thereafter, and throughout her period of residence in Japan and while the war continued, she was frequently invited to become a Japanese citizen but steadfastly refused. In the spring of 1945, she married D'Aquino, a Portuguese citizen. The

marriage was subsequent to the date of the commission of the overt act No. 6.

After having been employed in various jobs in 1942 and in the early part of 1943, appellant sought employment at Radio Tokyo and began her work as a typist for the Broadcasting Corporation of Japan in the fall of 1943. Shortly thereafter, she began her broadcast work for this corporation, which was under the control of the Japanese Government. There is evidence in the record that when the appellant took her voice test and accepted employment as an announcer and broadcaster for Radio Tokyo, she knew that her work was to be concerned with a program known as "Zero Hour," which was to be beamed and directed specially to Allied soldiers in the Pacific. She was told and understood that the program would consist of music and entertainment designed to procure a listening audience among Allied soldiers and that there was to be interspersed news and commentaries containing propaganda, which was to be used as an instrument of psychological warfare. Their object was to cause the Allied troops to become homesick, tired, and disgusted with the war.

Appellant participated in some 340 programs on the Zero Hour. She announced herself as "Ann" or "Orphan Ann." From time to time, she attended meetings of the participants in the Zero Hour program where the Japanese Army officers in command of the enterprise advised the persons present of the strategic importance of the program and urged continued efforts by the participants.

Issue

Appellant argues that we should direct a judgment of acquittal on the ground that the evidence was insufficient to sustain a conviction.

Reasoning

The overt act No. 6 was testified to by the requisite number of witnesses who observed and listened to the broadcast in question. One of them was a participant in the same Zero Hour program. He told the appellant of a release from Japanese General Headquarters giving the American ship losses in one of the Leyte Gulf battles and requested appellant to allude to those losses. She proceeded, as this witness and another testified, to type a script about the loss of ships. That evening, when appellant was present in the studio, the news announcer broadcast that the Americans had lost many ships in the battle of Leyte Gulf. Thereupon, appellant was introduced on the radio and proceeded to say in substance: "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now how do you think you will ever get home?"

It is true that the appellant's version of her role as a broadcaster was substantially different from that which we have here summarized from the testimony of the Government witnesses. According to appellant's version of the matter, the programs were exclusively entertainment and for that purpose only, she having been informed by the officer in command that the time for propaganda would not arrive until the Japanese were having more military and naval successes. Some of appellant's witnesses testified that they were responsible for having her brought into the Zero Hour program. These persons were American prisoners of war who testified that they had been coerced into participation in this program. They testified that what they were up to was a sabotaging of the program insofar as it was designed to be propaganda to American soldiers, that they managed to inject in the program many reports of American prisoners of war and messages from them, and that the appellant cooperated with them in their efforts to frustrate the purposes of the Japanese military operating through the broadcasting corporation to destroy the morale of the American soldiers.

Holding

Whether appellant's version of her activities in broadcasting should be accepted rather than that disclosed by the Government witnesses was, of course, a question for the jury. Insofar as it is contended that the program was merely one to entertain the American troops, such a version of the evidence would, we have no doubt, tax the credulity of a jury who would be hard put to imagine the Japanese military spending time and money solely for that purpose. . . . The testimony was that she brought food, cigarettes, medicine, a blanket, and short wave news of Allied successes to these prisoners and that she did this frequently at substantial risk to herself.

We are unable to perceive the force of appellant's argument in this respect. A general treasonable intent to betray the United States through the impairing of its war effort in the Pacific might well accompany a particular feeling of compassion toward individual prisoners and sympathy for the plight in which they found themselves. Were it psychologically impossible for a person engaged in a treasonable enterprise simultaneously to furnish cigarettes and food to individual prisoners, appellant's argument upon this point might have some weight. We think that the question of the effect of these acts of kindness upon appellant's intent was one for the jury. Certainly, under the circumstances here, the court cannot declare that there must be a reasonable doubt in a reasonable mind and hence direct a verdict. The question of the existence of a reasonable doubt was for the jury. . . .

The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. The overt acts in one recent case consisted of the accused's furnishing food, lodging, transportation, and employment to his son. Certainly, these acts of parental solicitude are not criminal. However, the fact the son

was a German saboteur, known as such to his father who had expressed his admiration for the Nazis and antipathy towards the United States, in addition to these overt acts, were held to constitute sufficient basis to sustain a conviction for treason. We think the court did not err in its ruling upon this point.

Issue

The court instructed the jury at length upon the defense that the criminal act was not committed voluntarily but was the result of coercion, compulsion, or necessity. The instruction included the statement that in order to excuse a criminal act on the ground of coercion, compulsion, or necessity, one must have acted under the apprehension of immediate and impending death or of serious and immediate bodily harm. Fear of injury to one's property or remote bodily harm do not excuse an offense. . . . The charge was a correct statement of the law upon this subject.

Appellant seriously contends that however correct the instruction might be in an ordinary case where a person accused of crime committed in his own country claims to have been coerced by an individual, the instruction of the court was in error particularly in its requirement of apprehension of immediate and impending death, or of immediate bodily harm, in a case where the accused person was in an enemy country, unable to get protection from the United States, and where the compulsion is on the part of the enemy government itself. The contention is that under these circumstances, the requirement of "immediacy" in the court's instructions was error. . . . We think that under the circumstances here, there was no occasion for departing from the ordinary rules applicable to the defense of duress and coercion.

Reasoning

We know of no rule that would permit one who is under the protection of an enemy to claim immunity from prosecution for treason merely by setting up a claim of mental fear of possible future action on the part of the enemy. We think that the citizen owing allegiance to the United States must manifest a determination to resist commands and orders until such time as he is faced with the alternative of immediate injury or death. Were any other rule to be applied, traitors in the enemy country would by that fact alone be shielded from any requirement of resistance. The person claiming the defense of coercion and duress must be a person whose resistance has brought him to the last ditch.

In support of this defense of coercion, appellant testified that one Takano, her civilian superior, informed her that she was "to take army orders . . . you know what the consequences are. . . ." She undertook to give this statement significance by testimony as to atrocities inflicted by the Japanese upon certain internees and prisoners of war who disobeyed military orders. The testimony relating to the statement of Takano is the only evidence in the record that would appear to support the giving of an instruction with respect to duress or coercion. Appellant testified that she was not forced to take her position at Radio Tokyo and said that she did not broadcast because of any actual physical coercion or threats thereof. The only qualification of this testimony was the statement of Takano, which she testified was made to her before she began her broadcasting activities. She testified that she was not mistreated by the Japanese police. She performed her duties as script writer and announcer for the Zero Hour from November 1943 until August 1945. During this period, she had pay raises, she was allowed the usual American holidays, and occasionally, she absented herself from the broadcasting for considerable periods of time. These absences did not result in any immediate or drastic measures from her employers. On those occasions, she ignored verbal and written demands to return to work and did so with impunity and only returned to work when a Japanese official called upon her. There is no evidence of any determined refusal on her part that might have provoked coercion or brought about immediate and actual danger to her. In other words, there is no evidence that the appellant ever so conducted herself as to bring about a demonstration that death or serious and immediate bodily harm was to be apprehended for a refusal.

Appellant was permitted to introduce a vast amount of testimony that she says was in support of her claim that she operated in fear and under apprehension of harm to herself. Thus, she testified that during her stay in Japan after war began, she was interrogated by the police and was kept under constant surveillance by them. Her living quarters were searched by the police, and she was required to obtain permission to move from place to place. She asked to be interned, but this was denied her. She also testified that her neighbors, other civilians, were suspicious of her; that she was under fear of mob violence from the Japanese populace. In addition, there was received evidence of atrocities practiced on the prisoners of war by the Japanese and evidence that for refusal by prisoners of war to obey orders the penalty of death was inflicted. Other witnesses called by appellant testified to instances in which guards killed prisoners in cold blood and tortured and beat others. Some prisoners of war had been compelled by threats of death or other violence to participate in the operation of the Zero Hour broadcast. In general, these experiences relating to such prisoners and to other victims of atrocities were communicated to the appellant.

Holding

In our opinion, the instructions of the court contained on the whole an adequate statement of the law relating to duress and coercion, and they were in our opinion as favorable to appellant as she had the right to demand.

Questions for Discussion

1. According to the prosecution, what were the defendant's overt acts of treason, and what was her criminal intent? Does the defendant admit that she possessed a criminal intent?
2. Did the defendant act in response to duress? Should the duress defense be recognized for acts of treason?
3. What of the argument that the defendant was exercising her right of freedom of expression? Would you convict the defendant in this case?
4. The defendant was sentenced to ten years in prison and a fine of $10,000. Would you have sentenced her to death? In 1977, D'Aquino was pardoned by President Gerald Ford based on evidence that indicates that she was not "Tokyo Rose" and that her broadcasts, in fact, had assisted American troops by alerting them to planned attacks.

Sedition

Sedition at English common law was any communication intended or likely to bring about hatred, contempt, or disaffection with the king, the constitution, or the government. This agitation could be accomplished by **seditious speech** or **seditious libel** (writing). Sedition was punishable by imprisonment, fine, or pillory. In *The Case of the Seven Bishops* in 1688, English Justice Allybone pronounced that "[n]o man can take upon him to write against the actual exercise of the government . . . be what he writes true or false. . . . It is the business of the government to manage . . . the government; it is the business of subjects to mind their own properties and interests." Sedition was gradually expanded to include any and all criticism of the king or the government and the advocacy of reform of the government or church, as well as inciting discontent or promoting hostility between various economic and social classes.

During the debates over the U.S. Constitution, various speakers predicted that the effort to restrict the definition of treason would prove a "tempest in a teapot" because the government would merely resort to other laws to punish critics. This seemed borne out in 1798, when Congress passed the Alien and Sedition Acts. These laws punished any person writing or stating anything "false, scandalous and malicious" against the government, president, or Congress with the "intent to defame" or to bring them into "disrepute" or to "excite . . . the hatred of the . . . people of the United States, or to stir up sedition." The law differed from the common law in that the statute recognized truth as a defense. An individual convicted of sedition under the act was subject to a maximum punishment of two years in prison and by a fine of no more than $2,000. Although the law was defended as an effort to combat subversives who sought to sow the seeds of revolutionary violence, in fact, it was used to persecute political opponents of the government. For instance, a member of Congress from Vermont was sentenced to four months in prison for writing that President John Adams should be committed to a mental institution.

The modern version of the Alien and Sedition Acts is § 2383 in Title 18 of the U.S. Code. This statute punishes an individual who "incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof or gives aid or comfort thereto." This is punished by imprisonment for up to ten years, a fine, or both. An individual convicted of rebellion or insurrection under this law is prohibited from holding any federal office. Note that § 2383 prohibits incitement to sedition or criminal action against the United States or against a particular law.

The U.S. Code, in § 2384, punishes **seditious conspiracy**. This statute is directed at the use of force against the government, the use of force to prevent the execution of any law, or the use of force to interfere with governmental property and has been employed by prosecutors in recent years in terrorist prosecutions.

> If two or more persons in any state, territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall be fined . . . or imprisoned not more than twenty years or both.

In 1940, Congress adopted the Smith Act, which declared that it was a crime to conspire to teach or advocate the forcible overthrow of the U.S. government or to be a member of a group that advocated the overthrow of the government. In *Dennis v. United States* in 1951, the Supreme Court upheld the constitutionality of this statute and affirmed the convictions of twelve leaders of the Communist Party. The Supreme Court reconsidered the wisdom of this ruling in the next case, *Yates v. United States*.

The Legal Equation

Did the defendants commit sedition by teaching and advocating the desirability of overthrowing the U.S. government?

YATES V. UNITED STATES, *354 U.S. 298 (1957),* OPINION BY: HARLAN, J.

We brought these cases here to consider certain questions arising under the Smith Act, which have not heretofore been passed upon by this Court, and otherwise to review the convictions of these petitioners for conspiracy to violate that Act. Among other things, the convictions are claimed to rest upon an application of the Smith Act that is hostile to the principles upon which its constitutionality was upheld in *Dennis v. United States,* 341 U.S. 494 (1951).

Facts

These fourteen petitioners stand convicted, after a jury trial in the United States District Court for the Southern District of California, upon a single count indictment charging them with conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The Smith Act, as enacted in 1940, provided in pertinent part as follows:

SEC. 2. (a) It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; . . .

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

. . .

SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

. . .

SEC. 5. (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.

Effective September 1, 1948, the Smith Act was repealed, and substantially reenacted as 18 U.S.C. § 2385, as part of the 1948 recodification.

There can be no doubt from the record that in so instructing the jury, the court regarded as immaterial, and intended to withdraw from the jury's consideration, any issue as to the character of the advocacy in terms of its capacity to stir listeners to forcible action. Both the petitioners and the Government submitted proposed instructions that would have required the jury to find that the proscribed advocacy was not of a mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to such action. The trial court rejected these proposed instructions on the ground that any necessity for giving them that may have existed at the time the *Dennis* case was tried was removed by this Court's subsequent decision in that case. The trial court made it clear in colloquy with counsel that in its view, the illegal advocacy was made out simply by showing that what was said dealt with forcible overthrow and that it was uttered with a specific intent to accomplish that purpose, insisting that all such advocacy was punishable "whether it is language of incitement or not." The Court of Appeals affirmed on a different theory, as we shall see later on.

Issue

We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.

Reasoning

The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court. . . . The legislative history of the Smith Act and related bills shows beyond all question that Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action and that Congress did not intend to disregard this distinction. The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government and not of principles divorced from action. . . .

As one of the concurring opinions in *Dennis* put it: "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." There is nothing in *Dennis* that makes that historic distinction obsolete.

In light of the foregoing, we are unable to regard the District Court's charge upon this aspect of the case as adequate. The jury was never told that the Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government. We think that the trial court's statement that the proscribed advocacy must include the "urging," "necessity," and "duty" of forcible overthrow, and not merely its "desirability" and "propriety," may not be regarded as a sufficient substitute for charging that the Smith Act reaches only advocacy of action for the overthrow of government by force and violence. The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something. At best, the expressions used by the trial court were equivocal, since in the absence of any instructions differentiating advocacy of abstract doctrine from advocacy of action, they were as consistent with the former as they were with the latter. . . .

We recognize that distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action are often subtle and difficult to grasp, for in a broad sense, as Mr. Justice Holmes said . . . "Every idea is an incitement." But the very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue that went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal character of the evidence in this record. . . . Instances of speech that could be considered to amount to "advocacy of action" are so few and far between as to be almost completely overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value. Vague references to "revolutionary" or "militant" action of an unspecified character, which are found in the evidence, might in addition be given too great weight by the jury in the absence of more precise instructions. Particularly in light of this record, we must regard the trial court's charge in this respect as furnishing wholly inadequate guidance to the jury on this central point in the case. We cannot allow a conviction to stand on such "an equivocal direction to the jury on a basic issue."

Holding

As to the petitioners Connelly, Kusnitz, Richmond, Spector, and Steinberg, we find no adequate evidence in the record that would permit a jury to find that they were members of . . . a conspiracy to advocate the violent or unlawful overthrow of the government. . . . Moreover, apart from the inadequacy of the evidence to show, at best, more than the abstract advocacy and teaching of forcible overthrow by the Party, it is difficult to perceive how the requisite specific intent to accomplish such overthrow could be deemed proved by a showing of mere membership or the holding of office in the Communist Party. We therefore think that as to these petitioners, the

evidence was entirely too meager to justify putting them to a new trial and that their acquittal should be ordered.

As to the nine remaining petitioners, we consider that a different conclusion should be reached. There was testimony from the witness Foard, and other evidence, tying Fox, Healey, Lambert, Lima, Schneiderman, Stack, and Yates to Party classes conducted in the San Francisco area during the year 1946, where there occurred what might be considered to be the systematic teaching and advocacy of illegal action, which is condemned by the statute. It might be found that one of the purposes of such classes was to develop in the members of the group a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points. There was also testimony as to activities in the Los Angeles area, during the period covered by the indictment, which might be considered to amount to "advocacy of action" and with which petitioners Carlson and Dobbs were linked. From the testimony of the witness Scarletto, it might be found that individuals considered to be particularly trustworthy were taken into an "underground" apparatus and there instructed in tasks that would be useful when the time for violent action arrived. Scarletto was surreptitiously indoctrinated in methods, as he said, of moving "masses of people in time of crisis." It might be found, under all the circumstances, that the purpose of this teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe.

In short, while the record contains evidence of little more than a general program of educational activity by the Communist Party, which included advocacy of violence as a theoretical matter, we are not prepared to say, at this stage of the case, that it would be impossible for a jury, resolving all conflicts in favor of the Government and giving the evidence as to these San Francisco and Los Angeles episodes its utmost sweep, to find that advocacy of action was also engaged in when the group involved was thought particularly trustworthy, dedicated, and suited for violent tasks. . . .

Questions for Discussion

1. The Supreme Court distinguishes between the advocacy of action and the advocacy of abstract doctrine. Can you explain the difference?
2. Why does the Court employ this formula to distinguish seditious libel from freedom of expression protected under the First Amendment? Do you believe that advocacy of action and advocacy of abstract doctrine are easily distinguished from one another?
3. Should individuals be free to praise "suicide bombers" or terrorist attacks? How about to urge individuals to become "suicide bombers" and to attack the United States?

Sabotage

Sabotage is the willful injury, destruction, contamination, or infection of any war material, war premises, or war utilities with the intent of injuring or interfering or obstructing the United States or an allied country during a war or national emergency. Sabotage is punishable by imprisonment for not more than thirty years, a fine, or both.[4]

> Whoever, when the United States is at war, or in times of national emergency as declared by the President or by Congress, with the intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities shall be fined under this title or imprisoned not more than thirty years, or both.

Sabotage may also be committed in peacetime against defense material, premises, or utilities.[5]

> Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined under this title or imprisoned not more than 20 years, or both, and, if death results to any person, shall be imprisoned for any term of years or for life.

Other provisions punish the injury or destruction of harbors, premises, or utilities (e.g., transportation, water, power, electricity) and the production of defective national defense materials.[6]

Courts have held that sabotage requires a specific intent or purpose to damage the national defense of the United States. A defendant injuring property that he or she does not realize is part of the military defense may rely on the defense that although he or she intentionally damaged the property, there was a lack of a specific intent to injure the national defense. Several courts have taken the position that a knowledge standard satisfies the *mens rea* for sabotage. These judges reason that a defendant should be assumed to know that the destruction of defense material is practically certain to interfere with the national defense.

In *United States v. Kabat,* the defendants broke through a fence surrounding a missile silo in Missouri and used a jackhammer to slightly damage cables and chip a 100-ton lid covering the silo. The defendants were motivated by a desire to protest nuclear weapons and to educate the public concerning the mass destruction that would result from nuclear war. They hung banners and spray painted slogans that called attention to the fact that these weapons made the world less rather than more safe and were contrary to biblical teachings. Did the high-minded defendants who were motivated by a desire to save the planet from nuclear destruction possess a specific intent to injure, interfere with, or damage the national defense? The Eighth Circuit Court of Appeals ruled that the defendants' "intent to injure, interfere with or obstruct the national defense" was clear from their antinuclear statements and travel to Missouri for the specific purpose of damaging the missile silo. The damage to the silo clearly "interfered" with the defense of the United States, and to "allow citizens who thought they could further U.S. security to act on their theories at will could make it impossible for this country to maintain a coherent defense system." The issue remains whether the defendants intended to damage the national defense.[7]

The Legal Equation

Espionage

For a deeper look at this topic, visit the study site.

The U.S. Code prohibits **espionage** or spying. The statute punishes espionage and espionage during war as separate offenses.[8]

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . faction or party or military or naval force within a foreign country . . . or to any representative or citizen thereof either directly or indirectly any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless [the jury or judge determines that the offense resulted in] the death of an agent of the United States . . . or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or

retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or element of defense strategy.

Espionage in wartime is also defined in federal statutes.

> Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

One of the most active areas of criminal activity in the new global economy is the theft by foreign governments of trade secrets from U.S. corporations. This may range from the formula for a new anticancer drug to the code for a computer program. Individuals involved in "industrial espionage" are subject to prosecution under the Economic Espionage Act of 1996.

In *Gorin v. United States,* the U.S. Supreme Court ruled that espionage during peacetime requires that the government establish that an individual acted in "bad faith" with the intent to injure the United States or to advantage a foreign nation. The foreign government that receives the information may be a friend or foe of the United States, because a country allied with the United States today may prove to be America's enemy tomorrow. The majority in *Gorin* held that "evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain." Material that is stolen from American military files concerning British troop strength and armed preparedness may not directly harm the United States but may assist or advantage another country in protecting itself against the British and may constitute espionage.[9]

Note that espionage during wartime is easier for the prosecution to prove and requires the establishment of an intent to communicate information to the enemy along with a clear act toward the accomplishment of this goal.

National defense information that has not yet been officially released to the public but that has been reported by the press or generally referred to in government publications may be the subject of espionage because the government has not made the decision to release the specific details. Stealing plans for the design of a nuclear bomb in American defense files would be espionage, despite the fact that the broad outlines of the design are available on the Internet.

Information subject to espionage is not limited to the specific types of materials listed in the statutes. Under the espionage law, national defense is broadly interpreted to mean any information relating to the military and naval establishments and national preparation for war.

The Legal Equation

Espionage	=	Communicates, delivers, transmits, or attempts to communicate, deliver, or transmit information
	+	to a foreign government, faction, or military
	+	purposely to injure or reason to believe that material will injure the United States or will be used to advantage a foreign nation.

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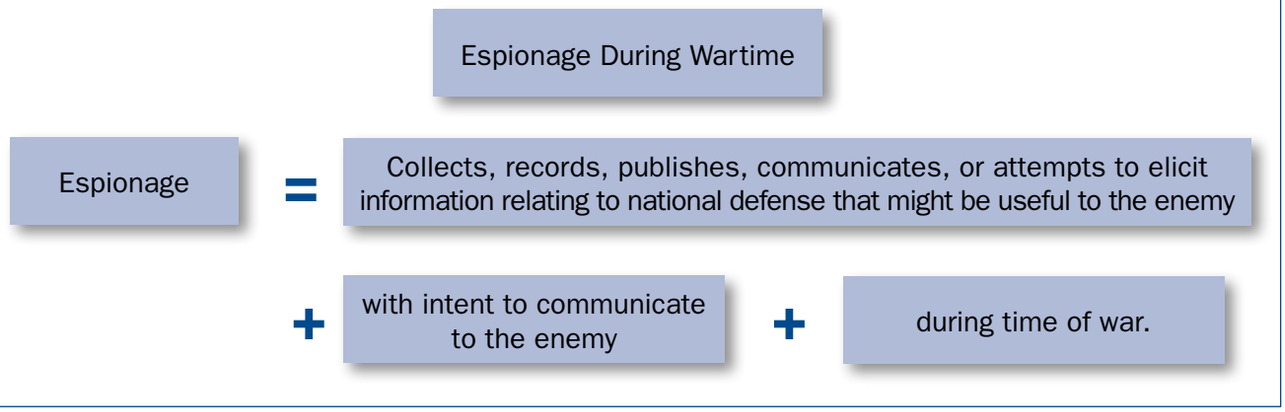

Terrorism

The bombing of the Alfred P. Murrah federal building in Oklahoma City on April 19, 1995, and the attack on the United States on September 11, 2001, combined to push Congress to act to prohibit and to punish terrorism. Keep in mind that most acts of terrorism within the United States are prosecuted as ordinary murders, arson, kidnappings, and bombings rather than as acts of terrorism.

The central provisions of the U.S. law on terrorism are found in Title 18 of the U.S. Code, Chapter 113B, "Terrorism." These statutes have been amended and strengthened by the Anti-Terrorism and Effective Death Penalty Act (1996) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001), better known as the USA PATRIOT Act.

Definition of Terrorism

For a deeper look at this topic, visit the study site.

Various federal statutes use the term *terrorism* or *terrorist.* For instance, it is a crime to materially aid a terrorist or foreign terrorist organization. What is terrorism? Federal law divides terrorism into **international terrorism** and **domestic terrorism**.

International terrorism is distinguished by the fact that it occurs outside the United States. Both international and domestic terrorism are intended to intimidate or coerce the American population or are intended to influence or affect the public policy of the United States. We have several tragic examples, the August 7, 1998, bombing of the U.S. embassies in Kenya (killing 213 and injuring more than 4,500) and Tanzania (killing 11 and injuring 85) and the attack on a U.S. Navy warship, the *USS Cole*, in Yemen on October 12, 2000 (killing 17 U.S. sailors). Other clear examples are the acts of violence intended to force America to withdraw troops from Iraq. International terrorism is defined as

- violent acts or acts dangerous to human life that
- primarily occur outside the United States,
- would be criminal if committed in the United States, and
- appear to be intended to either
- intimidate or coerce a civilian population; or
- influence the policy of a government by intimidation or coercion; or
- affect the conduct of a government through mass destruction, assassination, or kidnapping.

Domestic terrorism is defined in the same fashion with the exception that it occurs "primarily within the territorial jurisdiction of the United States" rather than "outside the United States." Note that terrorism is defined in terms of the intent of the offender rather than by the target of the attack.

The U.S. Code defines the **federal crime of terrorism** as an offense "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" that involves a violation of a long list of violent and dangerous federal offenses.[10] Chapter 113B of the U.S. Code provides for several specific terrorist crimes that are discussed in the following sections.

Terrorism Outside the United States

Section 2332 of the U.S. Code punishes various crimes against nationals of the United States that occur outside the United States. The killing of an American national outside the United States is punishable by imprisonment for a term of years or death as well as a fine. Voluntary manslaughter is subject to ten years' imprisonment along with a fine, and involuntary manslaughter is punished by a fine or imprisonment of not more than three years or both. A conspiracy to kill a U.S. national is punished by up to life imprisonment as well as a fine, and a conspiracy leading to an attempt is subject to imprisonment for up to twenty years in prison as well as a fine. Physical violence with the intent to cause serious bodily injury to a U.S. national and physical violence that results in serious bodily injury are both subject to a fine as well as to imprisonment by up to ten years. The U.S. assertion of the right to prosecute and punish criminal acts that occur outside American territory is termed **extraterritorial jurisdiction**.[11]

Terrorism Transcending National Boundaries

U.S. law punishes as a felony acts of terrorism that occur within the United States but that are connected to foreign countries. Offenses involving conduct occurring both outside and within the United States are termed **terrorism transcending national boundaries**. In other words, the fact that conspirators meet in another country and plan to attack an American city would not remove the crime from the jurisdiction of the United States. A prime example are the September 11, 2001, attacks on the World Trade Center and Pentagon, which were planned, directed, and funded from outside the United States. This statute permits the United States to prosecute individuals living in Afghanistan, England, Germany, Spain, and other countries who were involved in the 9/11 conspiracy. Federal law also provides that criminal attacks against U.S. agencies, embassies, or property abroad or in the air or at sea against property owned by the U.S. government or by an American citizen are considered to have taken place within American territory and are punishable by the United States.

Three crimes of violence are included within the statute on terrorism that transcends national boundaries:

- *Crimes Against the Person*. Killing, kidnapping, maiming, or committing an assault resulting in serious bodily injury or assault with a dangerous weapon against an individual within the United States.
- *Crimes Against Property Harming the Person*. Acts that create a substantial risk of serious bodily injury by destroying or damaging any structure, real estate, or object within the United States.
- *Inchoate Offense*. Threats, attempts, and conspiracies to commit either of these two offenses and accessories after the fact.

The offenses under this provision must meet one of several conditions. These include the following:

- *Federal Official*. The victim or intended victim is the U.S. government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches or of any department or agency of the United States.
- *Property*. The building, vehicle, real estate, or object is owned or leased by the United States or a U.S. citizen.
- *Territory*. The offense is committed within the territorial sea or American airspace.
- *Interstate Commerce*. The offense makes use of the mail or any facility in interstate or foreign commerce.

Penalties include capital punishment for a crime resulting in death, life imprisonment for the crime of kidnapping, thirty-five years for maiming, thirty years for aggravated assault, and twenty-five years for damaging property.[12]

Weapons of Mass Destruction

The use, threat, attempt, or conspiracy to use a **weapon of mass destruction** is punishable by imprisonment for a term of years or life and, in the event of death, by life imprisonment.

The statute on weapons of mass destruction, 18 U.S.C. § 2332a, declares that it is a crime when such a weapon is used outside the United States against an American resident or citizen or within

the United States against any person so as to affect commerce or against property within or outside the United States that is owned, leased, or used by the federal government. It is also an offense to threaten, attempt to use, or conspire to use a weapon of mass destruction. A weapon of mass destruction is defined as follows:

- Toxic or poisonous chemical weapons that are designed or intended to cause death or serious bodily injury (poison gas).
- Weapons involving biological agents (smallpox).
- Weapons releasing radiation or radioactivity at a level dangerous to human life (nuclear material).
- Explosive bombs, grenades, rockets, missiles, and mines.

See *more cases on the study site:* United States v. Davila, *www.sagepub.com/lippmanccl2e*

Possession of a biological or toxic weapon or delivery system that cannot be justified by a peaceful purpose is subject to imprisonment for up to ten years or a fine or both.[13] In April 2005, Zacarias Moussaoui, while denying involvement in the September 11, 2001, attacks against the Pentagon and World Trade Center, pled guilty to conspiring to use on an airplane a "weapon of mass destruction" to attack the White House.

Mass Transportation Systems

Subways, buses, and trains are some of the most vulnerable and potentially damaging terrorist targets. In 1995, a chemical gas attack on a subway train in Tokyo resulted in twelve deaths and more than 5,000 injuries. Federal law provides that it is a crime to willfully wreck, derail, set fire to, or disable a mass transportation vehicle or ferry or to damage or impair the operation of a signal or control system. It is also a crime to cause the death or serious bodily injury of an employee or passenger on a mass transportation vehicle. Other provisions prohibit using a weapon of mass destruction against a mass transportation system. These offenses are punishable by a fine and as much as twenty years in prison. An aggravated offense punishable by up to life in prison results when the mass transportation vehicle or ferry is carrying one or more passengers or the offense results in the death of any person.[14] The destruction of aircraft and air piracy are subject to punishment under separate provisions of the U.S. Code. Air piracy is defined in Title 49, § 46502, as "seizing or exercising control" over an aircraft by force, violence, threat of force or violence, or any form of intimidation with a wrongful intent.[15]

Harboring or Concealing Terrorists

It is a crime to harbor or conceal a person who an individual knows or has reasonable grounds to believe has committed or is about to commit various terrorist offenses or crimes posing a serious and widespread danger. Harboring a terrorist is subject to ten years in prison and to a fine.[16]

Material Support for Terrorism

The offense of providing **material support to a terrorist** is defined in the U.S. Code as providing material support or resources or concealing or disguising the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for or in carrying out various terrorist acts or acts of violence or in the preparation of, concealment of, or escape from such crimes. This is punishable by imprisonment for no more than fifteen years, a fine, or both. In the event that death results, the accused is subject to imprisonment for a term of years or capital punishment.

There is a separate offense of knowingly providing **material support to a foreign terrorist organization** or an attempt or conspiracy to do so. This is also subject to imprisonment for up to fifteen years, a fine, or both. The death of a victim may result in imprisonment for up to life.

Material support or resources in support of terrorism includes money, financial services, housing, training, expert advice or assistance, personnel, safe houses, false documentation, communication equipment, facilities, weapons, lethal substances, explosives, transportation, and other "physical assets." Medical and religious materials are exempt from the prohibition on material support.[17] The U.S. Secretary of State is charged with determining whether a group is a foreign terrorist organization.[18]

These two statutes are the primary laws relied on by prosecutors in terrorist prosecutions in the United States, with close to sixty persons having been prosecuted between September 2001 and May 2004. Prosecutors explain that the material support statutes are central in combating terrorism because hardcore terrorists rely on the support provided by individuals willing to provide financial resources, passports, expertise in computer technology, weapons, and information. These laws also have been relied on by the government to prosecute individuals for "providing personnel to terrorist organizations" who have traveled abroad to undergo terrorist training. The material support statutes have the advantage of permitting the arrest of individuals before terrorist plots are carried out.

Critics caution that the material support provisions may be used to prosecute individuals who do not pose a threat. For instance, defendants in a New York case who had attended a terrorist training camp abroad and who had not been involved with terrorist activities after returning to the United States pled guilty to providing material support. It is also argued that these statutes are broadly written and that individuals may be criminally prosecuted who have merely donated money to a hospital or school in the Middle East run by a group labeled as terrorist.

The next case, *United States v. Shah,* discusses whether the material provision statutes are void for vagueness. This is followed by *United States v. Khan,* which illustrates how prosecutors and courts analyze the facts in a prosecution under the material support statute. In reading these cases, consider whether there is a risk that individuals may be unfairly convicted under the material support laws.

The Legal Equation

Material support to terrorists	=	Provide material support to a terrorist or conceal or disguise the nature, location, source, or ownership of material
	+	knowing or intending that support or resources are used in preparation for or in carrying out various terrorist acts.
Material support to foreign terrorist organizations	=	Provide material support to a foreign terrorist organization
	+	knowingly provides material support.

Did the doctor provide material support to al Qaeda?

UNITED STATES v. SHAH, *474 F. SUPP. 2D 492 (S.D.N.Y. 2007),* OPINION BY: PRESKA, J.

Issue

Defendant Rafiq Sabir is charged as part of a four-count . . . indictment with conspiring to provide, and providing and attempting to provide, "material support or resources" to al Qaeda, in the form of "medical support to wounded jihadists," in violation of 18 U.S.C. § 2339B. At conferences held on October 30, 2006, and January 17, 2007, the court heard oral argument on Sabir's motion to dismiss the indictment on the ground that it is unconstitutional to prosecute a doctor under § 2339B for providing medical services.

Facts

In the indictment, which was returned by a Grand Jury on December 6, 2006, Sabir is charged in Counts One and Two. Count One charges a conspiracy to violate § 2339B as follows:

> From at least in or about October 2003, up to and including in or about May 2005, in the Southern District of New York and elsewhere . . . RAFIQ SABIR, a/k/a "the Doctor" and others known and unknown, unlawfully and knowingly combined, conspired, confederated and agreed together and with each other, to provide material support or resources, namely personnel, training, and expert advice and assistance, as those terms are defined in Title 18, United States Code, Sections 2339A and 2339B, to a foreign terrorist organization, namely, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and was redesignated as such on or about October 5, 2001, and October 2, 2003, to wit, the defendants knowingly agreed to provide (i) one or more individuals (including themselves) to work under al Qaeda's direction and control and to organize, manage, supervise, and otherwise direct the operation of al Qaeda, (ii) instruction and teaching designed to impart a special skill to further the illegal objectives of al Qaeda, and (iii) advice and assistance derived from scientific, technical, and other specialized knowledge to further the illegal objectives of al Qaeda, to wit, . . . RAFIQ SABIR, a/k/a "the Doctor," agreed to provide medical support to wounded jihadists, knowing that al Qaeda has engaged and engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), and that al Qaeda has engaged and engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

Count Two charges a substantive violation of § 2339B as follows:

> From at least in or about October 2003, up to and including in or about May 2005, in the Southern District of New York and elsewhere . . . RAFIQ SABIR, a/k/a "the Doctor" . . . unlawfully and knowingly provided, and attempted to provide, material support or resources, namely personnel, training, and expert advice and assistance, as those terms are defined in Title 18, United States Code, Sections 2339A and 2339B, to a foreign terrorist organization, namely, al Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and was redesignated as such on or about October 5, 2001, and October 2, 2003, to wit, the defendant knowingly provided, and attempted to provide, (i) one or more individuals (including themselves) to work under al Qaeda's direction and control and to organize, manage, supervise, and otherwise direct the operation of al Qaeda, (ii) instruction and teaching designed to impart a special skill to further the illegal objectives of al Qaeda, and (iii) advice and assistance derived from scientific, technical, and other specialized knowledge to further the illegal objectives of al Qaeda, to wit . . . RAFIQ SABIR, a/k/a "the Doctor," provided and attempted to provide medical support to wounded jihadists, knowing that al Qaeda has engaged and engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), and that al Qaeda has engaged and engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act. The Act included a new substantive prohibition against the provision of material support or resources to designated foreign terrorist organizations (codified at § 2339B). As amended, it is unlawful to engage in the following conduct:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any terms of years or for life.

"'[M]aterial support or resources' has the same meaning given that term in section 2339A (including the definitions of 'training' and 'expert advice or assistance' in that section)." Section 2339A is an antiterrorism law enacted by Congress in 1994 as part of the Violent Crime Control and Law Enforcement Act. The term *material support or resources* was originally defined as constituting

> currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not directly involved in such violations.

In 1996, Congress amended the definition of *material support or resources* to replace the phrase "but does not include humanitarian assistance to persons not directly involved in such violations" with the phrase "except medicine or religious materials." Congress intended the term *medicine* to "be understood to be limited to the medicine itself, and does not include the vast array of medical supplies."

In December 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA). The IRTPA included amendments to § 2339B, several of which bear on Sabir's challenge to the statute. First, the IRTPA added "expert advice or assistance" as a type of "material support or resource" and defined it to mean "advice or assistance derived from scientific, technical, or other specified knowledge." Second, the IRTPA defined *personnel,* which was previously undefined, to mean the provision of "[one] or more individuals (who may be or include himself) to work under [a foreign] terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." In defining *personnel,* Congress excluded from its scope "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives. . . ." Finally, the IRTPA clarified the degree of knowledge required to violate § 2339B as follows: "To violate [§ 2339B(a)(1)], a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism."

Reasoning

Sabir contends that the indictment is unconstitutional and should be dismissed because § 2339B deprives him of his right to practice medicine. Specifically, Sabir asserts that § 2339B "does not sufficiently identify the prohibited conduct so that [Sabir] in his profession and practice as a medical doctor, could know, what if any of his conduct as it relates to the practice of medicine would violate the statue." The source of the vagueness, according to Sabir, is that § 2339B excludes "medicine" from the itemized list of the types of "material support or resources" defined in § 2339A(b)(1), and the plain-language definition of a doctor is someone who is qualified or licensed to practice medicine. In other words, according to Sabir, "medicine" is inextricably intertwined with "doctor," and thus, he had no way of knowing in advance what conduct would subject him to prosecution under § 2339B.

The Fifth Amendment to the Constitution of the United States guarantees that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." "The vagueness doctrine is a component of the right to due process." A statute can run afoul of the vagueness doctrine on two grounds. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." Accordingly, the court must determine whether the statute gives adequate notice of its criminal prohibition and whether it creates a threat of arbitrary law enforcement.

An analysis of the statutory text in question demonstrates that Sabir's reliance on the exclusion of the term *medicine* from the itemized list of the types of "material support or resources" is misplaced. In § 2339B, Congress chose to exclude from prosecution persons who provide "medicine" to a designated foreign terrorist organization knowing that said organization engages in terrorism or terrorist activity. However, Congress did not exclude from prosecution persons who provide "medical support" to such organizations with that knowledge.

Sabir contends that the court should not draw this distinction because "medicine to the plain and ordinary person means the provision of medical services." (Edward Wilford, counsel for Sabir: "How do you differentiate the giving of medicine from what medicine is[?]" . . . Mr. Wilford: "It says 'medicine.' I've taken the broader step of including medical services, because it's our position you can't separate out medical services from medicine. Medicine in a vacuum means nothing."). Sabir's argument is erroneous because it completely overlooks, and is inconsistent with, the statute's carefully calibrated reach based on the detailed definitions of, among other terms, *expert advice or assistance* and *personnel*. The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. The definitions of *expert advice or assistance* and *personnel* do not specifically exempt doctors from their coverage. Cf. *United States v. Sattar,* 314 F. Supp. 2d 279, 299 (S.D.N.Y. 2004) ("*Sattar II*" rejecting a similar argument made by an attorney being prosecuted for violating § 2339A: "[Lynne] Stewart argues that even if the terms of Section 2339A literally reach the conduct charged, it should not cover the conduct of lawyers. . . . But there is nothing in the text of the statute, indeed in any source, that indicates that lawyers are exempt from the coverage of this statute."). Moreover, any reasonable doctor would be on notice from the plain language of the statute that conspiring to provide, or providing or attempting to provide, "medical support to wounded jihadists" under the direction and control of al Qaeda, knowing that al Qaeda engages in terrorism or terrorist activity, would constitute the provision of "expert advice or assistance"—"advice or assistance derived from scientific, technical, or other specified knowledge"—and "personnel"—"[one] or more individuals (who may be or include himself) to work under [a foreign] terrorist organization's direction or control."

Section 2339B does not deprive Sabir the right to practice medicine. It is not beyond the power of Congress to prohibit the provision of medical services by a doctor working under the control or direction of a terrorist organization. Cf. *Sattar II,* 314 F. Supp. 2d at 302 ("Lawyers . . . are not immune from criminal liability arising out of offenses committed while representing clients, and indeed defense counsel conceded at argument that lawyers have no license to violate generally applicable criminal laws."). To the extent Sabir contends that Congress should not distinguish between a "doctor" and "medicine," that is not an argument for this forum. (Mr. Wilford: "How do you separate a doctor from medicine? The Court: They just did. Congress is entitled to do that. Mr. Wilford: But Congress can be wrong. The Court: Oh, that's not my job. Mr. Wilford: Yes, it is. The Court: Congress writes the statutes. If you and I think that they're stupid, ill-conceived, anything like that, and that Congress is wrong, that's not our job here. Mr. Wilford: Your Honor, I used 'wrong' colloquially. If the statute is unconstitutional, that's where the Court comes in."). Sabir is not charged merely for being a doctor or for performing medical services. Here, Sabir is alleged essentially to have volunteered as a medic for the al Qaeda military, offering to make himself available specifically to attend to the wounds of injured fighters. Much as a military force needs weapons, ammunition, trucks, food, and shelter, it needs medical personnel to tend to its wounded. Thus, applied to the conduct alleged against Sabir in the indictment, § 2339B is not unconstitutionally vague.

At oral argument, counsel for Sabir posited two hypotheticals in support of the assertion that the statute is unconstitutionally vague. The court treats these examples as part of Sabir's assertion that § 2339B is facially vague. First, counsel for Sabir contended that a doctor who happens to treat a wounded person while working at a hospital when the person is brought in for treatment, and it later turns out that the person was a jihadist, would be subject to prosecution, under the Government's view of § 2339B. Second, counsel for Sabir asserted that a nongovernmental organization (NGO) that provided medical services, such as "Doctors Without Borders/Medicins Sans Frontieres," would be subject to prosecution, under the Government's view of § 2339B.

These hypotheticals are without merit because in both examples a reasonable doctor would understand that he could not be subject to prosecution under § 2339B. Neither the doctor in the first hypothetical who treats a terrorist by random chance nor the doctor for the NGO in the second hypothetical who treats a terrorist in connection with an NGO's work is acting under the "direction or control" of a designated foreign terrorist organization knowing that said organization engages in terrorism or terrorist activity. To the contrary, the doctors in these hypotheticals would constitute "[i]ndividuals . . . act[ing] entirely independently of [a] foreign terrorist organization" and would not be "considered to be working under [a] foreign terrorist organization's direction and control." Accordingly, the Government represented that the doctors in these hypotheticals would not be prosecuted under § 2339B. (Statement of Karl Metzner, Assistant United States Attorney: "[T]he concern about Doctors Without Borders and all that is ill-founded because of the definition of personnel. The government is required to prove that Dr. Sabir worked or agreed to work under the terrorist organization's direction or control before he can be convicted under this statute. That eliminates the nongovernmental organizations and others who provide assistance on their own.")

Holding

Accordingly, the plain language of the defined terms in § 2339A provides constitutionally sufficient precision about the scope of the activity prohibited so that anyone of ordinary intelligence, including Sabir as a doctor, would understand that agreeing "to provide medical support to wounded jihadists," under the direction and control of al Qaeda, knowing that al Qaeda has engaged and engages in terrorism or terrorist activity, would be prohibited. The level of detail in § 2339B and its defined terms also precludes the conclusion that the Government will enforce the statute arbitrarily or discriminatorily. For the reasons set out above, Sabir's motion to dismiss the indictment is denied.

Questions for Discussion

1. Discuss the development of §§ 2339A and 2339B. Why does Sabir contend that these statutes failed to inform Sabir of the conduct that was prohibited by these laws?
2. Why did the district court reject Sabir's argument?
3. Should doctors be held criminally liable for fulfilling their professional responsibility to provide medical care?
4. As a judge, how would you rule in this case?

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Did the defendants provide material support to terrorist organizations?

UNITED STATES v. KHAN, *309 F. SUPP. 2D 789 (E.D. VA. 2004), OPINION BY: BRINKEMAN, J.*

This case came on for trial by the court beginning February 9, 2004, on an indictment against defendants Masoud Khan, Seifullah Chapman, Hammad Abdur-Raheem, and Caliph Basha Ibn Abdur-Raheem (hereinafter Caliph Basha). The indictment charged these four defendants, co-defendants who entered guilty pleas, and unnamed, unindicted co-conspirators with thirty-two counts. The superseding indictment alleged against these four defendants conspiracy, conspiracy to levy war against the United States, conspiracy to provide material support to al Qaeda, conspiracy to contribute services to the Taliban, conspiracy to contribute material support to Lashkar-e-Taiba (LET), commencing an expedition against a friendly nation, conspiracy to possess and use firearms in connection with a crime of violence, receipt of ammunition with cause to believe a felony will be committed therewith, and use and possession of firearms in connection with a crime of violence. Co-defendants Randall Royer, Ibrahim Al-Hamdi, Yong Kwon, Mohammed Aatique, Donald Surratt, and Mahmoud Hasan entered into plea agreements and pled guilty to various counts in the indictment.

The factual allegations in the indictment focus on the defendants' involvement in activities starting in January 2000 and continuing through June 2003, which the government maintained constituted preparation for violent jihad overseas against nations with whom the United States was at peace and providing material support to terrorist organizations. The indictment alleges that the preparations culminated in Khan and other co-conspirators attending a terrorist and jihad training camp after September 11, 2001, with the intent to proceed to Afghanistan and fight for the Taliban and al Qaeda against United States troops. The indictment further alleges that Royer and Al-Hamdi had participated in attacks on Indian forces in the disputed Kashmir region that Pakistan claims rightfully belongs should be part of Pakistan. . . .

Issue

The majority of the facts in this case are not in dispute. Rather, the parties differ dramatically as to the interpretation to be placed on the facts. More specifically, the government contends that the three defendants on trial shared extremist views of Islam with the others indicted in this case, which led them to prepare for violent physical jihad themselves or to prepare others for violent jihad directed at nations with whom the United States is at peace and, ultimately, at the United States.

Defendant Chapman counters that he is a moderate Muslim with no interest in violent jihad against any country. He argues that his possession of weapons was lawful and for legitimate recreational purposes, that he played paintball with other named co-conspirators for physical exercise, that he did not know the LET camp he and others visited in Pakistan trained persons for violent jihad, and that he had no intention himself of fighting India or any other nation and no intention of helping others engage in such fighting. Defendant Abdur-Raheem similarly argues that his possession of firearms, his training co-conspirators about the safety and maintenance of their firearms, and his participation in paintball were for purely recreational purposes. He disavows knowing the intention of other paintball players to use the game as a preparation for violent jihad. He also argues that he was never a part of any of the conspiracies. Defendant Khan argues that he was not a part of the paintball group and that his trip to Pakistan was for the purpose of settling a family legal problem. He argues that the time he spent at the LET camp was purely recreational, and he disavows any intention to go to Afghanistan to fight on behalf of the Taliban against the United States.

Facts

It is uncontested that Nabil Gharbieh came up with the idea of playing paintball. He and Kwon both testified that in early January 2000 after dining with Al-Timimi, the two of them discussed setting up a paintball group as a way of doing jihad. Jihad literally means a struggle, which may range from exercising self-discipline, such as controlling one's appetite, to violent combat against perceived enemies of Islam. Gharbieh, whom the court found to be a very credible witness, testified clearly that in early 2000, the war in Chechnya was a very "hot topic" among Muslims and was regularly discussed in the mosques and on Arabic satellite television. When he and Kwon discussed setting up paintball as a vehicle for jihad, their intention was to prepare for physical jihad in the sense of physical preparation for possible combat. They relied upon the Koran's teaching that Muslims must be proficient in the use of the crossbow, horseback riding, and swimming for their view about the requirement of being physically prepared for combat.

By early summer, the paintball games were a regular occurrence every other weekend. Initially played at public courses, the games were moved to private farm land in Spotsylvania County. Because Abdur-Raheem, Chapman,

and Surratt had prior military experience, they were asked to lead the paintball teams and train the players to improve their game. Although the defendants have tried to portray the paintball exercises as innocent fun, the court concludes that for the defendants and their co-conspirators, these games were viewed as not just an opportunity for outdoor exercise, fellowship, and an opportunity to improve self-defense skills, but also as preparation for real combat. The court bases this conclusion on the following facts.

The witnesses consistently testified that violent jihad in Chechnya was actively discussed by the paintballers. The players shared videotapes of war, and their paintball Web site, which was password protected, was used to disseminate information about jihad. To improve their paintball skills, the group asked those with military experience, Surratt, Abdur-Raheem, and Chapman, to lead drills. Both Abdur-Raheem and Chapman testified that they did lead these exercises. The first paintball season ended in late October 2000. The second season began in spring 2001 and ended as of September 11, 2001.

The fighting in Chechnya was discussed on the paintball field constantly. Some players such as Al-Hamdi openly discussed wanting to go to Chechnya to fight. Royer encouraged Al-Hamdi and described paintball as a means for helping them prepare to fight. Thompson described Chapman as saying that paintball would enable them to fight but was not sufficient to qualify a person to fight overseas. Thompson also testified that Chapman once described paintball as a stepping stone to real training, and Abdur-Raheem said similar things about paintball—that it had application to real fighting but was not equivalent to it. One time, Chapman e-mailed pages from a military training manual to the players, then asked if they had memorized the pages. Abdur-Raheem and Chapman taught flanking maneuvers and land navigation. Warm-ups included military-like calisthenics including duck walks and push-ups, with physical punishment such as pushing a car in neutral for those coming late. Chapman enforced the punishment.

Aatique testified that he understood a purpose of the paintball games was to get military training for jihad and that Kwon and Al-Hamdi specifically told him they were training for jihad. He learned on the paintball field that Al-Hamdi planned to go to a Pakistan camp to fight in Kashmir and ultimately die *shaheed* (a martyr in combat).

The defendants argue that their involvement in paintball was completely innocent. They called Jessica Sparks, an expert on the game of paintball, who explained that all the military-type tactics are just part of the game. Sparks described the physical rigors of the game, the need to do warm-ups, and the regular use of drills such as flanking. . . . On rebuttal, the government called Major David Laden, responsible for basic training at the United States Marine Corps base at Quantico, Virginia, who confirmed that starting in 1999, the Marine Corps used paintball as part of its training program. . . . Based on the totality of the evidence, the court finds that the paintball exercises were an integral part of many of the conspiracies charged in this case, as they were treated as part of training for violent jihad.

As with their participation in paintball, the issue as to what the defendants knew and intended with respect to their involvement with Lashkar-e-Taiba is also disputed. Markaz Dawa Wa'al Irshad was founded to organize Pakistani Muslims to conduct violent jihad against Russians in Afghanistan. Eventually, it divided into separate sections. The military wing, known in this case as LET, during the 1999 to 2003 period was primarily focused on defeating India's influence in Kashmir. The nature of LET is critical to this case because seven of the persons named in the indictment, including Chapman and Khan, spent time at LET camps in Pakistan.

Al-Hamdi, Aatique, Hasan, and Kwon testified about the posters they saw at the LET office in Lahore. One poster included the LET flag, along with a rifle firing through a burning balloon marked with the Indian flag, and balloons marked with American and Israeli flags next to it. The text reads, "Yesterday we saw Russia disintegrate, then India, next we see America and Israel burning." Another poster shows the LET flag flying, a boot on an American flag, and the United States Capitol in flames. Another shows an LET flag and a soldier with an LET patch on his shoulder firing a rifle at burning Indian, American, and Israeli flags.

Kwon testified that after September 11, he organized a meeting at the urging of Al-Timimi to address how Muslims could protect themselves and invited only those brothers who had participated in paintball training and owned weapons. Attendees at this September 16, 2001, meeting included Kwon, Al-Timimi, Royer, Aatique, Hasan, Caliph Basha, Gharbieh, Khan, and Abdur-Raheem. Chapman was in an LET camp at that time.

The Government presented testimony about this meeting from Gharbieh, Aatique, Hasan, and Kwon. . . . At the beginning of the meeting, Al-Timimi told the attendees that the gathering was an "amana," meaning that it was a trust that should be kept secret. The secrecy was underscored by having the window blinds drawn and the phones disconnected from the wall. . . .

At the meeting, Al-Timimi stated that the September 11 attacks were justified and that the end of time battle had begun. He said that America was at war with Islam and that the attendees should leave the United States. The preferred option was to heed the call of Mullah Omar, leader of the Taliban, to participate in the defense of Muslims in Afghanistan and fight against United States troops that were expected to invade in pursuit of al Qaeda. As support for this proposition, Al-Timimi cited *fatwas,* or religious rulings, that called on Muslims to defend Afghanistan against impending American military action. The other option presented to the attendees was to make *hijrah,* that is, to relocate their families to a Muslim country. Royer said that anyone who wanted to fight in Afghanistan would first need to participate in

military training, that the LET camps in Pakistan were a good place to receive that training, and that Royer could facilitate their entry to the LET camps. . . . During their time at LET, Khan, Hasan, and Kwon traveled through several different camps and received training on commando tactics and weapons. Aatique saw Khan fire an antiaircraft gun, and Hasan and Kwon testified that both they and Khan fired an AK-47, an antiaircraft gun, and a rocket-propelled grenade. . . .

Chapman purchased an AA5 OR-2 airborne video system, which included a camera and transmitter that can be installed in a model airplane and will transmit video images back to a receiver from as far away as 5 miles. The range can be extended to 15 miles with use of an amplifier, which was included in the system. In December 2002, Khan purchased from Vesta Technologies an MP-1000SYS airplane control module. According to the testimony of Cindy Reish, general manager of Vesta Technologies, and the documents regarding the transaction maintained by that company (G Ex. 2C2a), the MP-1000SYS is a stability and control computer that can be programmed to fly an airplane with a 10-to-12-foot wingspan using Global Positioning System (GPS) coordinates. The unit controls altitude, speed, and navigation to programmed waypoints and can also be programmed to turn a video camera on and off when the airplane reaches certain locations. The majority of Vesta's customers for this technology are universities and the government, including NASA and the military. Common applications of the technology are using model airplanes equipped with video devices to monitor forest fires, property boundaries, gas lines, or livestock in remote or inaccessible areas.

Reasoning

The essential elements of a conspiracy charged are (1) an agreement by two or more persons to perform some illegal act, (2) willing participation by the defendant, and (3) an overt act in furtherance of the conspiracy.

Respectively, Counts 2, 3, and 4 charge Khan with conspiracy to levy war against the United States, conspiracy to provide material support to al Qaeda, and conspiracy to contribute services to the Taliban. The factual allegations supporting all three counts are that after the attacks of September 11, 2001, Khan joined a conspiracy to fight on behalf of the Taliban in Afghanistan against an expected invasion by United States forces pursuing al Qaeda and Osama bin Laden.

The elements of Count 3 are: (1) a conspiracy; (2) to knowingly provide material support or resources to a foreign terrorist organization; (3) within the United States or subject to the jurisdiction of the United States. The elements of Count 4 are: (1) a conspiracy, (2) to willfully make or receive any contribution of funds, goods, or services, to or for the benefit of the Taliban. Contributing services to the Taliban has been prohibited since July 4, 1999, and al Qaeda has been designated a foreign terrorist organization since October 9, 1999.

As we have found, the government's evidence establishes beyond a reasonable doubt that on September 16, 2001, Ali Al-Timimi urged the attendees at the meeting at Kwon's house to heed the call of Mullah Omar for all Muslims to help defend the Taliban. After the meeting, Khan heeded this advice and agreed with the three co-conspirators to travel to LET to obtain training with the object of fighting in Afghanistan. Fighting on behalf of the Taliban clearly constitutes providing services to that group. By September 16, 2001, it was clear that the fight for which Mullah Omar was bracing would be against United States forces and that any fighting in defense of the Taliban would be against United States troops. The parties have stipulated to this fact, witnesses have testified that they were aware of it, and we take judicial notice of it. Although Khan never succeeded in reaching Afghanistan and therefore never actually contributed his services to the Taliban, the testimony of multiple witnesses was that after the September 16 meeting, Khan intended to fight in Afghanistan, and he took concrete steps with co-conspirators to pursue that goal. This evidence establishes beyond a reasonable doubt that Khan is guilty of Counts 2 and 4.

To be guilty of Count 3, Khan must have intended to provide material support to al Qaeda. The testimony of co-conspirators who attended the September 16 meeting was that Khan was heeding the call of Mullah Omar to fight on behalf of an Islamic nation established in Afghanistan. Although the parties have stipulated that the Taliban was protecting al Qaeda and bin Laden at that time, we find no direct evidence that Khan intended to provide material support to al Qaeda. Although the law prohibits "any contribution of funds, goods, and services, to or for the benefit of the Taliban," the law prohibiting aid to al Qaeda is narrower, prohibiting only "material support or resources" directly to that organization. 18 U.S.C. § 2339B. *Material support or resources* is defined by statute as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." Although Khan's fighting on behalf of al Qaeda's protector, the Taliban, would certainly benefit al Qaeda, such assistance does not fit the statutory definition of *material support or resources*. Accordingly, we find Khan not guilty of Count 3.

The elements of Count 5, conspiracy to provide material support to LET, are: (1) a conspiracy; (2) to provide material support or resources or conceal or disguise the nature, location, source, or ownership of material support or resources; (3) knowing or intending that they are to be used in preparation for, or in carrying out, a violation of Title 18 U.S.C. § 956. Title 18 U.S.C. § 956 prohibits (1) conspiring within the United States, with one or more other persons, regardless of where such other person or persons are located; (2) to commit at any place

outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States, or to damage or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated; (3) an overt act within the United States in furtherance of the conspiracy.

We find ample evidence that LET was engaged in a conspiracy under 18 U.S.C. § 956 to commit crimes of violence and damage property in India, a foreign country with which the United States was at peace. Such evidence includes the Taiba bulletins published by LET taking credit for attacks on troops and civilian targets in India, as well as the news accounts of those attacks that several co-conspirators testified that they read. . . .

Khan and Chapman conspired to provide, and actually provided, model airplane video and navigation equipment to LET. . . . Such equipment fits the definition of material support cited above as both communications equipment and physical assets. The evidence also shows that the paintball leaders, including Chapman and Abdur-Raheem, conspired to provide material support to LET in the form of "personnel." Although defendants have repeatedly argued that attending an LET training camp does not constitute providing personnel to that organization . . . we do not find that argument applicable, given the facts of this case.

In *Humanitarian Law Project v. United States,* 352 F.3d 382 (9th Cir. 2003), the Ninth Circuit found the term *personnel,* as used in 18 U.S.C. § 2339A, unconstitutionally vague because it could be construed to prohibit protected speech on behalf of a designated terrorist organization. To cure this objection, the Department of Justice has established a policy that a person may be prosecuted under § 2339A if and only if that person has knowingly provided that organization with one or more individuals to work under the organization's direction or control. Because we read criminal statutes narrowly to avoid constitutional infirmities, we find that the statute as applied to this case does not implicate First Amendment concerns at all. The conspiracy alleged in Count 5 was not to provide "personnel" who would speak on behalf of LET, or provide moral support, or simply receive training, but to provide personnel who, after receiving training, would serve that organization as soldiers, recruiters, and procurers of supplies. Indeed, the evidence shows that the conspirators did much more than just receive training from LET—they returned to the United States, recruited co-conspirators, and purchased technology for LET to use in its attacks on India. Although there is no evidence that Abdur-Raheem participated in Chapman and Khan's technology transfers, his role in the paintball group with co-conspirators Chapman and Al-Hamdi, who did more than just train with LET, coupled with Abdur-Raheem's stated intent to help militant Muslims fighting against India, proves his participation in the conspiracy to provide material support to LET. . . . We find beyond a reasonable doubt that Khan, Chapman, and Abdur-Raheem are guilty of Count 5.

Holding

For the above stated reasons, we find defendants Khan, Chapman, and Abdur-Raheem guilty. . . .

Questions for Discussion

1. What facts supported the charges that the defendants conspired to provide material support to the Taliban and LET? Why were the defendants acquitted of providing material assistance to al Qaeda?
2. Discuss the importance of the paintball games for the prosecution's case. What is the significance of the meeting held on September 16, 2001?
3. Do you believe that these defendants should be convicted despite the fact that there is no evidence that they engaged in acts of terrorism? Why should America be interested in whether the defendants plan to attack a country other than the United States, in this case India? What actual harm resulted from the defendants' actions?
4. Does attending a terrorist training camp materially assist a terrorist organization?

Crime in the News

In November 2001, U.S. forces in Afghanistan captured a group of foreign fighters aligned with the Islamic fundamentalist Taliban regime. Among the captives was twenty-year-old John Walker Lindh, labeled by the media as the "American Taliban." The bearded Lindh, his face covered with dirt and grime, agreed to an interview with a cable news outlet, and Lindh's image filled the airwaves and the newspapers. Lindh related that he had entered Afghanistan to help the Taliban because they are the only government that is true to Islam and that he

"definitely" believed that he was fighting for a just cause. The American public asked how a frail college-aged young person from northern California could end up fighting against the United States in Afghanistan. Were his parents correct that he had been brainwashed? His mother was quoted as observing that Lindh was a fearful and easily influenced young man who was "totally not streetwise." John's father insisted that "John loves America."

Lindh was the middle child and was named after the former member of The Beatles rock group John Lennon. His father was Catholic and worked as a government lawyer in Washington, D.C. His mother was a health care worker who became a Buddhist. The family moved north of San Francisco when John was ten, and he attended an alternative school for bright and independent students. His father, Frank Lindh, describes John as adept at music and languages and a serious student. John became interested in Islam at age twelve after watching the movie *Malcolm X,* which featured the religious pilgrimage (*Hajj*) to Mecca, Saudi Arabia, that is required of all Muslims. As John turned sixteen, he became a Muslim, regularly attended a mosque, adopted the names Suleyman al-Lindh and Suleyman al-Faris and occasionally wore a long white robe and turban. As his parents' marriage began to break apart in 1998, John asked for money to journey to Yemen to learn Arabic. He returned to California after a year and, still restless, returned to continue his studies in Yemen in February 2000. John e-mailed his parents following the terrorist attack on the *USS Cole* in Yemen in 2000 that the United States' docking of a naval ship in the foreign harbor was an act of war and that the *Cole* had been properly targeted for attack. In October, John left for Pakistan and enrolled in an Islamic fundamentalist school (*madrasah*) where he joined the Harkadat-ul Mujahedeen-Al Almi, a terrorist group dedicated to liberating Kashmir from Indian control. John became disillusioned after twenty-four days of training and left to join the Taliban. He reportedly spent seven weeks at an al Qaeda camp where he was trained in weapons, explosives, battlefield technique, and map reading and reportedly met Osama bin Laden on several occasions and "swore allegiance to jihad" (armed struggle). In October 2001, Lindh was assigned with other foreign fighters to serve on the frontlines against the Northern Alliance, an opposition group aligned with the United States in seeking to forcefully remove the Taliban regime.

Lindh was discovered by American troops in a basement bunker with other captured Taliban soldiers. Lindh and the other fighters had retreated into the bunker after having launched a prison revolt that resulted in the death of American CIA agent Johnny Michael Spann.

Lindh entered into a plea agreement in which he agreed to plead guilty to supplying services to the Taliban in violation of an order issued by Presidents Clinton and Bush and of carrying a rifle and two hand grenades while engaged in a felony. In return, Lindh was sentenced to twenty years in prison. He also agreed to cooperate with investigators and to withdraw any claims of mistreatment. Some contend that the plea bargain reflected the fact that the government doubted whether it could obtain a conviction on treason. Others believed that the government did not want the public to learn of the physical abuse American interrogators allegedly directed toward Lindh.

In Lindh's fourteen-minute statement at sentencing, he condemned terrorism and denounced Osama bin Laden's attacks as contrary to Islamic teaching. Lindh explained that he had learned of the true nature of the Taliban and their repression of women only upon returning to the United States and that he had "made a mistake" by aligning himself with their cause. Are you persuaded by Lindh's apology? Did John Walker Lindh receive too lenient or too harsh a sentence?

Combat Immunity

American John Walker Lindh, the so-called American Taliban, was captured by American forces in Afghanistan and subsequently pled guilty to supplying services to the Taliban (the Islamic fundamentalist ruling party of Afghanistan) and of carrying an explosive during the commission of a felony. Lindh's lawyer made various arguments on his behalf, including **combat immunity**. This is the contention that as a member of the Afghan military, Lindh was immune from criminal prosecution for acts of lawful combat undertaken in the defense of Afghanistan against the United States. The U.S. government, however, contended that Lindh was not entitled to the status of a legal combatant and that his acts on behalf of the Taliban regime in Afghanistan were unlawful criminal offenses rather than acts of lawful warfare. The standard for determining whether an individual is a lawful or unlawful combatant is set forth in the **Geneva Convention of 1949**. The Geneva Convention is an international treaty regulating the law of war that the United States has signed and recognizes as part of American law.

The arguments discussed in *United States v. Lindh* raise the issue whether terrorists are entitled to be treated as prisoners of war rather than as unlawful fighters or as criminals. What is your view?

For an international perspective on this topic, visit the study site.

Is John Walker Lindh a lawful or unlawful combatant?

United States v. Lindh, *212 F. Supp. 2d 541 (E.D. Va. 2002), Opinion by: Ellis, J.*

John Phillip Walker Lindh is an American citizen who, according to the ten-count indictment filed against him in February 2002, joined certain foreign terrorist organizations in Afghanistan and served these organizations there in combat against Northern Alliance and American forces until his capture in November 2001. In seven threshold motions, Lindh sought dismissal of certain counts of the Indictment on a variety of grounds, including lawful combatant immunity.

Facts

The indictment's allegations may be succinctly summarized. In mid-2001, Lindh attended a military training camp in Pakistan run by Harakat ul-Mujahideen (HUM), a terrorist group dedicated to an extremist view of Islam. After receiving several weeks of training, Lindh informed HUM officials that "he wished to fight with the Taliban in Afghanistan." Thus, in May or June 2001, he traveled from Pakistan into Afghanistan "for the purpose of taking up arms with the Taliban," eventually arriving at a Taliban recruiting center in Kabul, Afghanistan—the Dar ul-Anan Headquarters of the Mujahideen. On his arrival, Lindh presented a letter of introduction from HUM and advised Taliban personnel "that he was an American and that he wanted to go to the front lines to fight." On October 8, 1997, HUM was designated by the Secretary of State as a foreign terrorist organization. . . .

According to the indictment, the Taliban is Afghanistan's dominant political force and its members, like the members of HUM, practice an extremist form of Islam. Specifically, members of the Taliban believe in conducting "jihad," or holy war, against those who they believe threaten their form of Islam, including the United States.

While at the Dar ul-Anan Headquarters, Lindh agreed to receive additional and extensive military training at an al Qaeda training camp. He made this decision "knowing that America and its citizens were the enemies of Bin Laden and al-Qaeda and that a principal purpose of al-Qaeda was to fight and kill Americans." In late May or June 2001, Lindh traveled to a bin Laden guest house in Kandahar, Afghanistan, where he stayed for several days, and then traveled to the al Farooq training camp, "an al Qaeda facility located several hours west of Kandahar." He reported to the camp with approximately twenty other trainees, mostly Saudis, and remained there throughout June and July. During this period, he participated fully in the camp's training activities, despite being told early in his stay that "Bin Laden had sent forth some fifty people to carry out twenty suicide terrorist operations against the United States and Israel." As part of his al Qaeda training, Lindh participated in "terrorist training courses in, among other things, weapons, orientating, navigation, explosives and battlefield combat." This training included the use of "shoulder weapons, pistols, and rocket-propelled grenades, and the construction of Molotov cocktails." During his stay at al Farooq, Lindh met personally with bin Laden, "who thanked him and other trainees for taking part in jihad." He also met with a senior al Qaeda official, Abu Mohammad Al-Masri, who inquired whether Lindh was interested in traveling outside Afghanistan to conduct operations against the United States and Israel. Lindh declined Al-Masri's offer in favor of going to the front lines to fight. It is specifically alleged that Lindh swore allegiance to jihad in June or July 2001.

The indictment alleges that al Qaeda is an organization, founded by Osama bin Laden and others, that is dedicated to opposing non-Islamic governments with force and violence. On October 8, 1999, al Qaeda was designated by the Secretary of State as a foreign terrorist organization, pursuant to section 219 of the Immigration and Nationality Act. . . .

When Lindh completed his training at al Farooq in July or August 2001, he traveled to Kabul, Afghanistan, where he was issued an AKM rifle "with a barrel suitable for long range shooting." Armed with this rifle, Lindh, together with approximately 150 non-Afghani fighters, traveled from Kabul to the front line at Takhar, located in northeastern Afghanistan, where the entire unit was placed under the command of an Iraqi named Abdul Hady. Lindh's group was eventually divided into smaller groups that fought in shifts against Northern Alliance troops in the Takhar trenches, rotating every one to two weeks. During this period, Lindh "carried various weapons with him, including the AKM rifle, an RPK rifle he was issued after the AKM rifle malfunctioned, and at least two grenades." He remained with his fighting group following the September 11, 2001 terrorist attacks, "despite having been told that Bin Laden had ordered the [September 11] attacks, that additional terrorist attacks were planned, and that additional al Qaeda personnel were being sent from the front lines to protect Bin Laden and defend against an anticipated military response from the United States." Indeed, it is specifically alleged that Lindh remained with his fighting group from October to December 2001, "after learning that United States military forces and United States nationals had become directly engaged in support of the Northern Alliance in its military conflict with Taliban and al Qaeda forces."

In November 2001, Lindh and his fighting group retreated from Takhar to the area of Kunduz, Afghanistan, where they ultimately surrendered to Northern Alliance troops. On November 24, 2001, he and the other captured Taliban fighters were transported to Mazar-e-Sharif and then to the nearby Qala-i-Janghi (QIJ) prison compound. The following day, November 25, Lindh was interviewed by two Americans—Agent Johnny Michael Spann from the Central Intelligence Agency (CIA) and another government employee. Later that day, it is alleged that Taliban detainees in the QIJ compound attacked Spann and the other employee, overpowered the guards, and armed themselves. Spann was shot and killed in the course of the uprising, and Lindh, after being wounded, retreated with other detainees to a basement area of the QIJ compound. The uprising at QIJ was eventually suppressed on December 1, 2001, at which time Lindh and other Taliban and al Qaeda fighters were taken into custody by Northern Alliance and American forces.

Following his capture, Lindh was interrogated, transported to the United States, and ultimately charged in this district with the following offenses in a ten-count indictment:

1. Conspiracy to murder nationals of the United States, including American military personnel and other governmental employees serving in Afghanistan following the September 11, 2001 terrorist attacks.
2. Conspiracy to provide material support and resources to HUM, a foreign terrorist organization.
3. Providing material support and resources to HUM.
4. Conspiracy to provide material support and resources to al Qaeda, a foreign terrorist organization.
5. Providing material support and resources to al Qaeda.
6. Conspiracy to contribute services to al Qaeda.
7. Contributing services to al Qaeda.
8. Conspiracy to supply services to the Taliban.
9. Supplying services to the Taliban.
10. Using and carrying firearms and destructive devices during crimes of violence.

Issue

Lindh claims that Count One of the indictment should be dismissed because, as a Taliban soldier, he was a lawful combatant entitled to the affirmative defense of lawful combatant immunity. Lindh makes no claim of lawful combatant immunity with respect to the indictment's allegations that he was a member or soldier of al Qaeda. Instead, Lindh focuses his lawful combatant immunity argument solely on the indictment's allegations that he was a Taliban member. This focus is understandable as there is no plausible claim of lawful combatant immunity in connection with al Qaeda membership. Thus, it appears that Lindh's goal is to win lawful combatant immunity with respect to the Taliban allegations and then to dispute factually the indictment's allegations that he was a member of al Qaeda.

Also worth noting is that the Government has not argued here that the Taliban's role in providing a home, a headquarters, and support to al Qaeda and its international terrorist activities serve to transform the Taliban from a legitimate state government into a terrorist institution whose soldiers are not entitled to lawful combatant immunity status. Put another way, the government has not argued that al Qaeda controlled the Taliban for its own purposes and that so-called Taliban soldiers were accordingly merely agents of al Qaeda, not lawful combatants.

Reasoning

Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. This doctrine has a long history, which is reflected in part in various early international conventions, statutes, and documents. But more pertinent, indeed controlling, here is that the doctrine also finds expression in the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, to which the United States is a signatory. Significantly, Article 87 of the Geneva Principles of War admonishes that combatants "may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." Similarly, Article 99 provides that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed." These articles, when read together, make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war. The United States Constitution provides that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . . ."

Importantly, this lawful combatant immunity is not automatically available to anyone who takes up arms in a conflict. Rather, it is generally accepted that this immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants. Thus, it is well established that the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are

subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition, they are subject to trial and punishment by military tribunals for acts that render their belligerency unlawful.

The starting point in the analysis of Lindh's immunity claim is recognition that the President has unequivocally determined that Lindh, as a member of the Taliban, is an unlawful combatant and, as such, may not invoke lawful combatant immunity. On February 7, 2002, the White House announced the President's decision, as Commander-in-Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and therefore, they were not entitled to POW status under the Geneva Conventions. . . . The appropriate deference is to accord substantial or great weight to the President's decision regarding the interpretation and application of the GPW to Lindh, provided the interpretation and application of the treaty to Lindh may be said to be reasonable and not contradicted by the terms of the treaty or the facts. It is this proviso that is the focus of the judicial review here of the President's determination that Lindh is an unlawful combatant under the GPW.

The GPW sets forth four criteria an organization must meet for its members to qualify for lawful combatant status:

1. The organization must be commanded by a person responsible for his subordinates;
2. The organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
3. The organization's members must carry arms openly; and
4. The organization's members must conduct their operations in accordance with the laws and customs of war.

Lindh asserts that the Taliban is a "regular armed force," under the GPW, and because he is a member, he need not meet the four conditions of the Hague Regulations because only Article 4(A)(2), which addresses irregular armed forces, explicitly mentions the four criteria. This argument is unpersuasive; it ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a "regular armed force." It would indeed be absurd for members of a so-called "regular armed force" to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label "regular armed force" cannot be used to mask unlawful combatant status.

The Taliban lacked the command structure necessary to fulfill the first criterion as it is manifest that the Taliban had no internal system of military command or discipline. Similarly, it appears the Taliban typically wore no distinctive sign that could be recognized by opposing combatants; they wore no uniforms or insignia and were effectively indistinguishable from the rest of the population. The requirement of such a sign is critical to ensure that combatants may be distinguished from the noncombatant, civilian population. Accordingly, Lindh cannot establish the second criterion.

Next, although it appears that Lindh and his cohorts carried arms openly in satisfaction of the third criterion for lawful combatant status, it is equally apparent that members of the Taliban failed to observe the laws and customs of war. Thus, because record evidence supports the conclusion that the Taliban regularly targeted civilian populations in clear contravention of the laws and customs of war, Lindh cannot meet his burden concerning the fourth criterion.

Holding

In sum, the President's determination that Lindh is an unlawful combatant and thus ineligible for immunity is controlling here because that determination is entitled to deference as a reasonable interpretation and application of the GPW to Lindh as a Taliban; because Lindh has failed to carry his burden of demonstrating the contrary; and because even absent deference, the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.

Questions for Discussion

1. What are the four standards in the Geneva Convention for determining lawful combatant status?
2. Why did the Taliban and Lindh not qualify as lawful combatants under the Geneva Convention?
3. What is the significance of whether an individual is a lawful or unlawful combatant?
4. Did Lindh commit treason against the United States? Was he punished too leniently or too harshly?
5. The four standards in the Geneva Convention seemingly preclude terrorists from being treated as prisoners of war. Should the standards be relaxed so that terrorists may be considered prisoners of war?

State Terrorism Statutes

Virtually every state has a terrorism statute to cover criminal acts that do not fall within federal jurisdiction. Consider the "beltway sniper" case from Virginia, *Muhammad v. Commonwealth*.

Were the shootings acts of terrorism?

Muhammad v. Commonwealth, *619 S.E.2D 16 (VA. 2005), Opinion by: Lemons, J.*

In these appeals, we consider two capital murder convictions and two death sentences imposed upon John Allen Muhammad, along with his convictions for conspiracy to commit capital murder and the illegal use of a firearm in the commission of murder. This prosecution arose from the investigation of a series of sixteen shootings, including ten murders that occurred in Alabama, Louisiana, Maryland, Washington, D.C., and Virginia over a forty-seven-day period from September 5 to October 22, 2002. For the reasons discussed herein, the judgment of the trial court and the sentences of death will be affirmed.

Facts

On the morning of Wednesday, October 9, 2002, Dean H. Meyers was shot and killed while fueling his car at the Sunoco gas station on Sudley Road in Manassas, Virginia. Meyers was shot in the head by a single bullet. The bullet entered behind his left ear, where it fragmented into multiple small pieces. The bullet fragments shattered the temporal bone, and the fragments of bullet and bone then traveled through his brain and caused multiple fractures of his skull. This gunshot wound was consistent with injuries from a bullet fired from a high-velocity rifle and was the cause of Meyers's death. Evidence at trial established that the bullet came from the .223 caliber Bushmaster rifle Muhammad possessed when he was arrested. An eyewitness testified that she saw Muhammad and Lee Boyd Malvo in the vicinity of the shooting approximately one hour beforehand. Police interviewed Muhammad immediately after the shooting in a parking lot across the street from where Meyers was shot. In both encounters, Muhammad was driving a Chevrolet Caprice in which he was later arrested. Muhammad's fingerprints were on a map police found in the parking lot where Muhammad had been interviewed. Meyers was killed during a forty-seven-day period, from September 5 to October 22, 2002, in which ten others were murdered and six more suffered gunshot wounds as a result of the acts of Muhammad and Malvo in concert. The murder of Meyers was the twelfth of these sixteen shootings.

The first shooting occurred in Clinton, Maryland, on September 5, 2002. Paul J. LaRuffa, the owner of Margellina's Restaurant, left the restaurant at closing and proceeded to his car with his briefcase and Sony portable computer. Inside the briefcase were bank deposit bags that contained $3,500 in cash and credit card receipts from that evening. LaRuffa placed the briefcase and laptop on the backseat of his car and then sat behind the steering wheel. He testified that almost immediately after he sat down, he saw a figure to his left and a flash of light. He heard gunshots and the driver's side window shattered. When he stepped out of his car, he realized he had been shot. The trauma surgeon who treated him testified that LaRuffa was shot six times: once in the back left side of his neck, three times in the left side of his chest, and twice in his left arm.

An employee who left the restaurant with LaRuffa, Paul B. Hammer, witnessed the shooting and called "911." Hammer testified that he saw a "kid" run up to LaRuffa's car, fire shots into it, and then open the rear door and take the briefcase and portable computer. He was unable to provide a detailed description because of lighting conditions but testified that the shooter was a male in his late teens or early twenties. The briefcase and empty bank deposit bags, along with a pair of pants and a shirt, were found six weeks later in a wooded area about a mile from the shooting. Hair on the clothing yielded DNA that was consistent with Malvo's DNA.

Four days later, on September 9, Muhammad purchased a 1990 Caprice automobile from Christopher M. O'Kupski in Trenton, New Jersey. O'Kupski testified that before the purchase, Muhammad got into the trunk and lay down. O'Kupski also testified that when Muhammad purchased it, the Caprice did not have a hole in the trunk or a passageway from the backseat to the trunk, the trunk was not spray-painted blue, and the windows were not tinted.

The second shooting occurred in Clinton, Maryland, on September 15, 2002. Muhammad Rashid was closing the Three Roads Liquor Store. Rashid testified that he noticed the Caprice outside the store shortly before closing. He testified that he was in the process of locking the front door from the outside when he heard gunshots from behind him. At the same time, a young man with a handgun rushed towards Rashid and shot Rashid in the stomach. At trial, Rashid identified Malvo as the person who shot him. Two bullets were removed from inside the store. The bullets had been shot through the front door and the trajectory of the bullets placed the shooter in a field across the street from the store.

The third and fourth shootings occurred in Montgomery, Alabama, on September 21, 2002. Claudine Parker and Kelly Adams closed the Zelda Road ABC Liquor

Store and walked out. They were shot immediately. Parker died as a result of a single gunshot wound that entered her back, transected her spinal cord, and passed through her lung. Adams was shot once through her neck but lived. The bullet exited through her chin, breaking her jaw in half, shattering her face and teeth, paralyzing her left vocal cord, and severing major nerves to her left shoulder. Both gunshot wounds were consistent with injuries caused by a high-velocity rifle. Testing revealed that the bullet fragments recovered from the Parker shooting were fired from a Bushmaster rifle possessed by Muhammad when he was arrested.

As the rifle shots were fired, a young man, later identified as Malvo, ran up to Parker and Adams. A police car happened to pass the scene immediately after the shots were fired. A police officer observed Malvo with a handgun. He was going through the women's purses. The officer and another eyewitness chased Malvo. Although he escaped, Malvo dropped an "ArmorLite" gun catalogue during the chase. At trial, both the officer and the other eyewitness identified Malvo as the young man with the handgun who fled the scene. Additionally, Malvo's fingerprints were on the "ArmorLite" gun catalogue he dropped during the chase. The handgun Malvo carried that evening, a .22 caliber stainless steel revolver, was found in the stairwell of an apartment building that Malvo ran through during the chase. Forensic tests determined that this .22 caliber revolver was the same gun used to shoot both LaRuffa and Rashid.

The fifth shooting occurred in Baton Rouge, Louisiana, on September 23. Hong Im Ballenger, the manager of the Beauty Depot store, closed the store for the evening. As she was walking to her car, she was shot once in the head with a bullet fired from a high-velocity rifle. Ballenger died as the result of the single shot. The bullet entered the back of her head and exited through her jawbone. The wound caused massive bleeding and compromised her airway. Ballistic tests determined that the bullet fragments recovered from Ballenger were fired from the Bushmaster rifle possessed by Muhammad when he was arrested. An eyewitness saw a young man leave the scene with Ballenger's purse. At trial, this young man was identified as Malvo. Another eyewitness saw Malvo flee the scene with Ballenger's purse and get into the Caprice.

The sixth shooting occurred in Silver Spring, Maryland, on October 3, 2002. At approximately 8:15 A.M., Premkumar A. Walekar was fueling his taxicab. He was shot once with a bullet from a high-velocity rifle. The bullet passed through his left arm and then entered his chest, where it broke two ribs, shredded portions of his lungs, and damaged his heart. A physician, who was fueling her car next to Walekar, attempted CPR but was unsuccessful. Ballistic tests established that bullet fragments recovered from the Walekar shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The seventh shooting occurred in Silver Spring, Maryland, on October 3, 2002. At approximately 8:30 A.M., Sarah Ramos was sitting on a bench in front of the Crisp & Juicy Restaurant in the Leisure World Shopping Center. She was shot once with a bullet from a high-velocity rifle. The bullet entered the front of her head and exited through her spinal cord at the top of her neck. An eyewitness identified the Caprice at the scene prior to the shooting. Bullet fragments recovered from the Ramos shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The eighth shooting occurred in Kensington, Maryland, on October 3, 2002. At approximately 10:00 A.M., Lori Lewis-Rivera was vacuuming her car at the Shell gas station on the corner of Connecticut Avenue and Knowles Avenue. She was shot once in the back by a bullet from a high-velocity rifle as she vacuumed her car. An eyewitness testified that he saw the Caprice in the vicinity of the gas station approximately twenty minutes before the shooting. Bullet fragments recovered from the Lewis-Rivera shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The ninth shooting occurred in Washington, D.C. on October 3, 2002. At approximately 7:00 P.M., a police officer stopped Muhammad for "running" two stop signs. The police officer testified that the windows of the Caprice were heavily tinted and that he could not see anyone else in the car. The police officer gave Muhammad a verbal warning and let him go.

At approximately 9:15 P.M. on that day, Paschal Charlot was shot in the chest as he crossed the intersection of Georgia Avenue and Kalmia Road. This intersection was about thirty blocks from where the police officer stopped Muhammad. The bullet entered Charlot's chest and shattered his collarbone and three ribs before lacerating his lungs. Charlot died before emergency personnel arrived. Eyewitnesses testified that they saw the Caprice at the scene at the time of the shooting and that the driver drove away without its headlights on immediately after the shooting. It had been parked in a space on the street with its trunk positioned toward Georgia Avenue. One eyewitness testified that he saw a flash of light from the Caprice at the time the shot was fired. Ballistics tests determined that the bullet fragments recovered from the Charlot shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The tenth shooting occurred in Fredericksburg, Virginia, on October 4, 2002. Caroline Seawell had finished shopping at a Michael's Craft Store and was putting her bags in her minivan, when she was shot once in the back by a bullet from a high-velocity rifle. The bullet severely damaged her liver and exited through her right breast. Seawell survived the shooting. An eyewitness testified that he saw the Caprice in the parking lot at the time of the shooting. Ballistics tests determined that the bullet fragments recovered from the Seawell shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The eleventh shooting occurred in Bowie, Maryland, on October 6, 2002. Tanya Brown ("Tanya")

took Iran Brown ("Brown") to Tasker Middle School. As Brown was walking on the sidewalk to the school, he was shot once in the chest by a bullet from a high-velocity rifle. Tanya decided not to wait for emergency personnel and drove Brown to a health care center. Brown's lungs were damaged, there was a large hole in his diaphragm, the left lobe of his liver was damaged, and his stomach, pancreas, and spleen were lacerated by bullet fragments. Surgeons were able to save Brown's life, and he spent eight weeks recovering in the hospital.

Two eyewitnesses testified that they saw the Caprice in the vicinity of Tasker Middle School the day before the shooting and the morning of the shooting. One of these eyewitnesses positively identified both Muhammad and Malvo in the Caprice the morning of the shooting. They were seen in the Caprice, which was parked at an intersection with a line of sight to the school. Following the shooting, police searched the surrounding area and found a ballpoint pen and a shell casing in the woods next to the school. The pen and shell casing were located in an area that had been patted down like a hunting blind. This blind offered a clear line of sight to the scene of the shooting. Tissue samples from the pen matched Muhammad's DNA. The shell casing had been fired by the Bushmaster rifle possessed by Muhammad when he was arrested, and tests determined that the bullet fragments recovered from Brown were fired from that rifle. In the woods, police also found the first communication from Muhammad and Malvo. A tarot card, the one for death, was found with handwriting that stated, "Call me God." On the back of the card was handwriting that stated, "For you, Mr. Police. Code: Call me God. Do not release to the Press."

The twelfth shooting, discussed above, was the murder of Dean Meyers in Manassas, Virginia, on October 9, 2002.

The thirteenth shooting occurred in Massaponax, Virginia, on October 11, 2002. Kenneth Bridges was at an Exxon gas station on Jefferson Davis Highway. He was shot once in the chest by a bullet from a high-velocity rifle. The bullet damaged his lungs and heart, causing fatal internal injuries. Two eyewitnesses testified that they saw the Caprice at or near the Exxon station on the morning of the shooting. Ballistics tests determined that the bullet fragments recovered from the Bridges shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

The fourteenth shooting occurred in Falls Church, Virginia, on October 14, 2002. Linda Franklin and her husband were shopping at a Home Depot store. As they loaded their purchases in their car, Franklin was shot and killed by a single bullet from a high-velocity rifle. The bullet entered the left side of her head, passed through her brain and skull, and exited from the right side of her head. An off-duty police officer testified that she saw Malvo driving the Caprice in the vicinity of the shooting immediately after it occurred. Tests determined that bullet fragments recovered from the Franklin shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested.

On October 15, the day after Franklin was murdered, a Rockville, Maryland, police dispatcher received a telephone call in which the caller stated: "Don't say anything, just listen, we're the people who are causing the killings in your area. Look on the tarot card, it says, 'call me God, do not release to press.' We've called you three times before trying to set up negotiations. We've gotten no response. People have died." The dispatcher attempted to transfer the call to the Sniper Task Force, but the caller hung up.

Three days later, on October 18, Officer Derek Baliles, a Montgomery County, Maryland, Police Information Officer, received a telephone call. The caller told Officer Baliles to "shut up" and stated that he knew who was doing the shootings but wanted the police officer to verify some information before he talked further. The caller told Officer Baliles to verify information concerning a shooting at a liquor store near "Ann Street." The caller gave Officer Baliles the name and telephone number of a police officer in Alabama. Officer Baliles confirmed the shootings of Parker and Adams. The caller called Officer Baliles again. Officer Baliles told him that he had verified the information concerning the shootings of Parker and Adams. The caller then said that he had to find more coins for the call and had to find a telephone without surveillance and then hung up.

On the same day, William Sullivan, a priest in Ashland, Virginia, received a telephone call from two people. The first voice, a male, told him someone wanted to speak with him. Sullivan testified that a second male voice, told him that "the lady didn't have to die," and "it was at the Home Depot." The second voice also told him about a shooting at a liquor store in Alabama and then said, "Mr. Policeman, I am God. Do not tell the press." The second voice concluded by telling Sullivan to give this information to the police.

The fifteenth shooting occurred in Ashland, Virginia, on October 19, 2002. Jeffrey Hopper and his wife stopped in Ashland to fuel their car and eat dinner. They left the restaurant and were walking to their car when Hopper was shot in the abdomen. Hopper survived the shooting but underwent five surgeries to repair his pancreas, stomach, kidneys, liver, diaphragm, and intestines. In the woods near the shooting, police found a hunting-type blind similar to the one found at the Brown shooting. At the blind, police found a shell casing, a plastic sandwich bag attached to a tree with a thumbtack at eye level that was decorated with Halloween characters and self-adhesive stars, and a candy wrapper. Tests determined that the shell casing and bullet fragments recovered from the Hopper shooting came from the Bushmaster rifle possessed by Muhammad when he was arrested. Surveillance videotapes identified Muhammad in a Big Lots Store on October 19, 2002, near the shooting from which the plastic sandwich bag and decorations were likely obtained. The candy wrapper contained both Malvo's and Muhammad's DNA. Police also

found a handwritten message in the plastic sandwich bag that read:

> For you Mr. Police. Call me God. Do not release to the Press. We have tried to contact you to start negotiation. . . . These people took our call for a Hoax or Joke, so your failure to respond has cost you five lives. If stopping the killing is more important than catching us now, then you will accept our demand which are non-negotiable. (i) You will place ten million dollar in Bank of america account. . . . We will have unlimited withdrawl at any atm worldwide. You will activate the bank account, credit card, and pin number. We will contact you at Ponderosa Buffet, Ashland, Virginia, tel. # . . . 6:00 am Sunday Morning. You have until 9:00 A.M. Monday morning to complete transaction. Try to catch us withdrawing at least you will have less body bags.
>
> (ii) If trying to catch us now more important then prepare you body bags.
>
> If we give you our word that is what takes place.
>
> Word is Bond
>
> P.S. Your children are not safe anywhere at anytime.

The note was not found until after the deadline had passed. The day after Hopper was shot at the Ponderosa, an FBI agent operating the "Sniper Tip Line" received a call from a young male who said, "Don't talk. Just listen. Call me God. I left a message for you at the Ponderosa. I am trying to reach you at the Ponderosa. Be there to take a call in ten minutes." On October 21, 2002, an FBI agent received a call to the FBI negotiations team, which had been rerouted from the Ponderosa telephone number referenced in the note left after the Hopper shooting. A recorded voice stated:

> Don't say anything. Just listen. Dearest police, Call me God. Do not release to the press. Five red stars. You have our terms. They are non-negotiable. If you choose Option 1, you will hold a press conference stating to the media that you believe you have caught the sniper like a duck in a noose. Repeat every word exactly as you heard it. If you choose Option 2, be sure to remember we will not deviate. P.S.—Your children are not safe.

The sixteenth shooting occurred in Aspen Hill, Maryland, on October 22, 2002. At approximately 6:00 A.M., Conrad Johnson, a bus driver for the Montgomery County Transit Authority, was shot in the chest at the entrance to his bus. Johnson remained conscious until rescue workers arrived but died at the hospital. A single high-velocity rifle bullet killed Johnson. The bullet entered his right chest and caused massive damage to his diaphragm, liver, pancreas, kidneys, and intestines. Tests determined that the bullet fragments recovered from the Johnson shooting were fired from the Bushmaster rifle possessed by Muhammad when he was arrested. A hunting-type blind, similar to those found at the Brown and Hopper shootings, was found in the woods near where Johnson was shot. A black duffle bag and a left-handed glove were found. A hair from the duffle bag yielded DNA that matched Muhammad's DNA. The police also found another plastic sandwich bag, which contained a note and self-adhesive stars.

Muhammad and Malvo were captured and arrested on October 24, 2002, by agents of the FBI at a rest area in Frederick County, Maryland. They were asleep in the Caprice at the time of their capture. Inside the Caprice, police found a loaded .223 caliber Bushmaster rifle behind the rear seat. Tests determined that the DNA on the Bushmaster rifle matched the DNA of both Malvo and Muhammad. The only fingerprints found on the Bushmaster rifle were those of Malvo. The Caprice had been modified after Muhammad purchased it from O'Kupski. The windows were heavily tinted. The rear seat was hinged, providing easy access to the trunk from the passenger compartment. The trunk was spray-painted blue. A hole had been cut into the trunk lid, just above the license plate. The hole was blocked by a right-handed brown glove that matched the left-handed glove found in the woods near the Johnson shooting. The trunk also had a rubber seal that crossed over the hole.

Inside the Caprice, police found a global positioning system (GPS) receiver, a magazine about rifles, an AT&T telephone charge card, ear plugs, maps, plastic sandwich bags, a rifle scope, .223 caliber ammunition, "walkie-talkies," a digital voice recorder, a receipt from a Baton Rouge, Louisiana, grocery store dated September 27, 2002, an electronic organizer, a plastic bag from a Big Lots Store, a slip of paper containing the Sniper Task Force phone number, and a list of schools in the Baltimore area.

Police also found LaRuffa's portable computer in the Caprice. Muhammad had loaded software entitled "Microsoft Streets and Trips 2002" onto this computer on September 29, 2002. In this program, there were various maps showing particular routes and places marked with icons, some with a skull and crossbones. Icons had been added to mark the places where Walekar, Lewis-Rivera, Seawell, Brown, Meyers, and Franklin were shot. There was also a Microsoft Word file titled "Allah 8.rtf" that contained portions of the text communicated to police in the extortion demands.

Subsequent to his arrest on October 24, 2002, Muhammad was indicted by a grand jury on October 28, 2002, for the capital murder of Meyers in the commission of an act of terrorism, capital murder of Meyers and at least one other person within a three-year period, conspiracy to commit capital murder, and illegal use of a firearm in the commission of capital murder.

From October 20 through November 17, 2003, Muhammad was tried before a jury in the Circuit Court of the City of Virginia Beach. The jury convicted Muhammad of all charges in the grand jury indictments. In a separate sentencing proceeding from November 17 through November 24, 2003, the jury sentenced Muhammad to two death sentences for the capital murder convictions, finding both the future dangerousness and vileness aggravating factors. The jury also sentenced Muhammad to thirteen years in prison upon the remaining convictions. At the conclusion of the sentencing proceeding, venue was transferred back to the Circuit Court of Prince William County. On March 9, 2004, the trial court imposed the two death sentences and the sentences of imprisonment as fixed by the jury. A final sentencing order was entered on March 29, 2004.

Issue

Muhammad maintains that the terrorism statutes, Code sections 18.2–31(13) and 18.2–46.4, are unconstitutionally overbroad and vague. We disagree.

Reasoning

A successful challenge to the facial validity of a criminal statute based upon vagueness requires proof that the statute fails to provide notice sufficient for ordinary people to understand what conduct it prohibits or proof that the statute "may authorize and even encourage arbitrary and discriminatory enforcement." But "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Capital murder pursuant to Code is defined as the "willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in Code § 18.2–46.4."

Act of terrorism means an act of violence as defined in clause (i) of subdivision A of section 19.2–297.1 committed with the intent to (i) intimidate the civilian population at large or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation. Code section 18.2–46.4. The "act of violence" reference to Code section 19.2–297.1 includes a list of certain specific aggravated felonies including murder, voluntary manslaughter, mob-related felonies, malicious assault or bodily wounding, robbery, carjacking, sexual assault, and arson. The combination of these statutes defines criminal conduct that constitutes a willful, deliberate, and premeditated killing in the commission, or attempted commission, of one of the designated felonies with the intent to intimidate the civilian population or influence the conduct of government through intimidation. Additionally, under Code section 18.2–18, the General Assembly extended the reach of criminal conduct subject to the death penalty to include "a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision 13 of § 18.2–31."

Muhammad raises questions about the definition of *intimidation,* "civilian population at large," and "influence the conduct or activities of government." He suggests that failure to statutorily define these phrases renders the statutes unconstitutional. He further complains that "no distinction can be drawn between the newly defined crime and any 'base offense' which carries with it the same hallmarks of intimidation and influence" and that this allows "unguided and unbridled law enforcement discretion." Muhammad further maintains that extending the scope of the statute to reach those who order or direct a killing in the commission of or attempted commission of an act of terrorism somehow violates what he calls the "triggerman rule." In a particularly exaggerated statement, Muhammad claims that extending the scope of the statute "allows almost any violent criminal act to be classified as terrorism and thereby rendering any individual charged eligible for the death penalty." We disagree with each of Muhammad's contentions.

By referencing established criminal offenses as acts of violence subject to the statutory scheme, the legislature included clearly defined offenses. . . . Additionally, the term *intimidate* has been defined by case law (defining intimidation as unlawful coercion, extortion, duress, putting in fear). We have no difficulty understanding that *population at large* is a term that is intended to require a more pervasive intimidation of the community rather than a narrowly defined group of people. . . . We do not believe that a person of ordinary intelligence would fail to understand this phrase.

Similarly, we do not believe that a person of ordinary intelligence needs further definition of the phrase "influence the conduct or activities of government." . . . Muhammad claims that the statutes are designed "to address al-Qaeda type attacks—attacks motivated by a greater political purpose." . . . Nothing in the words of these statutes evinces an intent to limit its application to criminal actors with political motives.

Muhammad maintains that there is no distinction between the "base offense" and the capital offense based upon terrorism. What he appears to be arguing is that the terrorism statute is unnecessary on the one hand because a killing in the commission of one of the enumerated violent acts could result in the death penalty anyway, and on the other hand, its reach is extended too far by including those who order or direct such killings. Clearly, the General Assembly has the power to define criminal conduct even if statutes overlap in coverage. Whether a defendant can be simultaneously or successively charged with overlapping offenses implicates other questions not presented here.

Muhammad's quarrel with the expansion of the potential imposition of the death penalty to those who

order or direct another in a killing in the commission of or attempted commission of an act of terrorism is a policy question well within the purview of legislative power so long as it is not otherwise unconstitutional. In that respect, Muhammad argues in Assignment of Error 18 that the provisions of Code section 18.2–18 allow the death penalty for a defendant with no demonstrated intent to kill the victim. Muhammad incorrectly characterizes the extension of the scope of the statute to reach traditional "aiders and abettors." The provisions of Code section 18.2–18 do not extend to "aiders and abettors"; rather, it extends only to those who "direct" or "order" the killing. The criminal actor who "orders" or "directs" the killing is not unlike the criminal actor who hires another to kill and is potentially subject to the death penalty under Code section 18.2–31(2). The criminal actor who "orders" or "directs" the killing shares the intent to kill with the one who carries out the murder. The provisions of Code section 18.2–18 do not have the effect imagined by Muhammad.

Holding

Muhammad's argument concerning vagueness does not focus on his conduct. Indeed, Muhammad does not claim in his brief that his actions and those of Malvo were not acts of terrorism under the statutory provisions. Rather, Muhammad hypothetically poses questions about the applicability of the statute in other circumstances. As discussed above, the statutes provide notice sufficient for ordinary people to understand what conduct they prohibit and do not authorize and/or encourage arbitrary and discriminatory enforcement. More importantly, Muhammad cannot and does not maintain that the statutes do not give him notice that his conduct and Malvo's conduct was prohibited. Nor does Muhammad allege that he has been subject to arbitrary or discriminatory enforcement of the statutes. One who engages in conduct that is clearly proscribed and not constitutionally protected may not successfully attack a statute as void for vagueness based upon hypothetical conduct of others.

Questions for Discussion

1. Describe Muhammad's criminal activities. Why does this course of killing constitute terrorism?
2. Is Muhammad correct that the terms *intimidate* and *civilian population at large* are vague and unclear and that he could not possibly have understood that his conduct constituted terrorism? What about his argument that any series of murders could be considered an act of terrorism? Do you believe that the defendants sought to "influence the conduct of government" within the meaning of the statute?
3. Why did Virginia not charge Muhammad with murder? Do you believe that Muhammad was properly charged with terrorism? Could Muhammad's terrorism offenses have been constitutionally prosecuted by the federal government rather than by the Commonwealth of Virginia?

Cases and Comments

1. ***The September 11 Attacks.*** On September 11, 2001, nineteen foreign nationals, functioning as separate terrorist teams, boarded and took control of four civilian aircraft. Two planes crashed into the twin towers of the World Trade Center in New York and a third careened into the Pentagon in Arlington, Virginia. The passengers on the fourth plane, realizing that the hijackers were intent on directing the plane into yet another government building, bravely resisted the hijackers, who responded by sending the plane spiraling into a Pennsylvania field. The terrorists' kamikaze attacks transformed the three aircraft and the 200,000 pounds of jet fuel into weapons of mass destruction and led to the death of roughly 3,000 people in the World Trade Center and hundreds of others at the Pentagon. Osama bin Laden, the leader of the al Qaeda terrorist organization, praised this as "good terror" and warned that the "battle has been moved inside America." He went on to proclaim that every American constituted the enemy and was to be killed.

The "suicide bombing" of September 11, 2001, ushered in what experts term "the new terrorism." This is characterized by religiously motivated groups who believe that the world must be destroyed in order to be saved from the "sex, drugs, and rock-and-roll" of American culture. The fear is that these terrorists may resort to the use of weapons of mass destruction.

The international community has been slow to respond to the threat of terrorism. The assassination of King Alexander I of Yugoslavia and Mr. Louis Barthou, Foreign Minister of France, on October 1, 1934, led the League of Nations (the early version of the United Nations) to formulate the 1937 Convention for the Prevention and Punishment of Terrorism. This required states to punish attacks committed on their territory against another country's leaders and officials. States that failed to prosecute the perpetrators were to send (extradite) the offenders to trial in the victim's state of nationality.

The international community failed to take action against terrorism until jolted into action by a series of attacks on airliners that threatened commercial air transportation. This led to two conventions, the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1963) and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971), which required states to either prosecute or extradite individuals for trial who committed crimes of violence aboard aircraft or who intentionally destroyed key components of the aircraft. Most importantly, states agreed

in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 to prosecute or send air hijackers to trial in nations claiming jurisdiction, including the state in which the plane was registered.

The next step was a series of treaties addressing other types of terrorism. Nations are bound to follow only the treaties that they agree to sign and make part of their own law. The United States has signed all of these counterterrorist agreements:

- *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973).* This protects Heads of State and other officials against attacks and requires states to prosecute assailants or to extradite them for trial in the victim's state of nationality.
- *International Convention Against the Taking of Hostages (1979).* States are to punish or extradite for trial any person who seizes or detains and threatens to kill, injure, or continue to detain any individual in order to compel a nation or international organization to perform or fail to perform any act as a condition of the release of a hostage.
- *International Convention for the Suppression of Terrorist Bombing (1989).* The treaty requires a nation to punish an individual who intentionally delivers or detonates an explosive or other device into or against a government facility, public transportation system, or infrastructure facility with the intent to cause death or serious bodily injury or extensive destruction. Offenders are to be prosecuted or extradited for trial in the victim's state of nationality.
- *Convention for the Suppression of the Financing of Terrorism (1989).* This agreement obligates nations to prevent and to punish individuals who transmit money to terrorists across international borders.

The next conventions to be adopted will likely address the prevention and punishment of nuclear terrorism. A recent United Nations agreement urges nations to prevent and to punish incitement to terrorism.

Efforts over the past decade to formulate a comprehensive treaty on terrorism that obligates all states to prevent, to punish, and to cooperate in combating terrorist acts and organizations have proven unsuccessful. Such a treaty, for instance, might require states to refuse to permit terrorist groups to operate in their country or to establish bank accounts and might obligate states to adopt laws punishing terrorism and incitement to terrorism. The main obstacle to a comprehensive treaty is the disagreement between nations that view terrorism as a universal evil and nations that argue that terrorism is justified to resist the domination of powerful countries. The Hostage Convention, in fact, provides that the treaty shall not apply to an act of hostage taking committed in conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Does the cause for which people are fighting justify the resort to terrorism? Another division is that some nations in the developing world believe that the terrorism carried out by big and powerful states in waging wars is far more serious than terrorism carried out by individual terrorists. Is terrorism a tactic that is employed by individuals, groups, and governments?

2. ***Crime on the Streets.*** We all are keenly aware that roughly 2,800 people died in the September 11, 2001, attack on the World Trade Center. This is the most costly terrorist incident in history as measured by dollars and the loss of human life. Terrorist statistics are notoriously unreliable because whether to categorize an act as terrorism can be fairly subjective. The statistics compiled by the National Counter Terrorism Center indicate that in 2004, we experienced 273 major terrorist attacks around the globe, the highest number of "significant terrorist incidents" since the United States started keeping statistics in 1968. This resulted in the death of 1,907 people, second only to the number killed in 2001 (due to September 11); the wounded numbered 6,704, and 710 people were taken hostage internationally. Eighty-three percent of attacks took place in the Middle East. Ten percent targeted U.S. citizens or property, and only one percent of all victims were Americans. Authors Clark R. Chapman and Alan W. Harris ask whether we might be overreacting to the September 11 attack and wasting time and money attempting to combat terrorism. They argue that the money could better be devoted to countering other types of accidents and improving social services. Consider the following observations by the authors:

- The number of deaths on September 11, 2001, are virtually identical to the monthly total of American traffic fatalities.
- September 11 deaths were ten times less than the number of annual deaths resulting from falls, from suicide, or from homicide.
- The Centers for Disease Control predicted in 2001 that 20,000 Americans would die from influenza during the winter.
- Twice as many people died in the floods stemming from the 1900 Galveston, Texas, hurricane as in the attack on the World Trade Center.
- The number of deaths on September 11, 2001, was equal to 1.5 percent of the worst epidemic in U.S. history; 1.5 percent of annual cancer deaths.

Are we devoting too many resources to countering terrorism? Are the authors overlooking the fact that a single successful terrorist attack could have a devastating impact? A nuclear bomb, for instance, would result in tens of thousands of casualties and contaminate and render uninhabitable a major American city. See Clark R. Chapman and Alan W. Harris, "How We Can Defeat Terrorism by Reacting to It More Rationally," *Skeptical Inquirer* (September/October 2002).

Chapter Summary

The founding figures of the United States were fearful of a strong centralized government and provided protections for individual freedom and liberty. Nevertheless, they appreciated that there was a need to protect the government from foreign and domestic attack and accordingly incorporated a provision on treason into the Constitution. This was augmented by congressional enactments punishing sedition, sabotage, and espionage. In recent years, the United States has adopted laws intended to combat global terrorism.

Treason is defined in Article III, Section 3 of the U.S. Constitution. Treason requires an overt act of either levying war against the United States or providing aid and comfort to an enemy of the United States. The accused must be shown to have possessed the intent to betray the United States. The Constitution requires two witnesses or a confession in open court to an act of treason.

Sedition at English common law constituted a communication intended or likely to bring about hatred, contempt, or disaffection with the king, the constitution, or the government. This was broadly defined to include any criticism of the king and of English royalty. American courts have ruled that the punishment of seditious speech and libel may conflict with the First Amendment right to freedom of expression. As a result, judges have limited the punishment of seditious expression to the urging of the necessity or duty of taking action to forcibly overthrow the government. A seditious conspiracy requires an agreement to take immediate action.

Sabotage is the willful injury, destruction, contamination, or infection of war materials, premises, or utilities with the intent to injure, interfere with, or obstruct the United States or an allied nation in preparing for or carrying on war. Sabotage may also be committed in peacetime and requires that the damage to property is carried out with the intent to injure, interfere with, or obstruct the national defense of the United States.

An individual is guilty of espionage who communicates, delivers, or transmits information relating to the national defense to a foreign nation or force within a foreign nation with the purpose of injuring the United States or with reason to believe that it will injure the United States or advantage a foreign nation. Espionage in wartime involves collecting, recording, publishing, communicating, or attempting to elicit such information with the intent of communicating this information to the enemy.

The U.S. Code, Chapter 113B, punishes various terrorist crimes. This has been strengthened by the Anti-Terrorism and Effective Death Penalty Act of 1996 and by the USA Patriot Act (2001). Terrorism is divided into international and domestic terrorism. International terrorism is defined as violent acts or acts dangerous to human life that occur outside the United States; domestic terrorism is defined as violent acts or acts dangerous to human life that occur inside the United States. Terrorist acts transcending national boundaries are coordinated across national boundaries.

Terrorist acts are required to be intended to either intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping. The U.S. government has primarily relied on the prohibition against material assistance to terrorists and to terrorist organizations in order to prevent and punish terrorist designs before they are executed. This law has proven to be a powerful tool to deny terrorists the resources they require to carry out attacks. Federal law also punishes terrorist crimes involving attacks on mass transit systems and the use of weapons of mass destruction and prohibits the harboring or concealing of terrorists. The United States does not consider terrorists to be lawful combatants, and they are not viewed as prisoners of war under the Geneva Convention by American authorities. Virtually every state has adopted a terrorism statute. Most terrorist offenses are based on the foundation offenses of treason, sedition, sabotage, and espionage.

Chapter Review Questions

1. Treason is the only crime defined in the U.S. Constitution. What is treason? What type of evidence is required to establish treason?
2. Define sedition. Distinguish seditious speech from seditious libel. What constitutes a seditious conspiracy?
3. What is sabotage? Distinguish between sabotage and sabotage during wartime.
4. Explain the difference between espionage and espionage during wartime.
5. How do the definitions of international and domestic terrorism differ?
6. List some of the terrorist crimes set forth in the U.S. Code.
7. What are the elements of material support for terrorism? Provide examples of some provisions of the material support statute that courts have considered "void for vagueness." What are the arguments for and against prosecuting individuals for providing material support to terrorists or to foreign terrorist organizations?
8. Define and discuss combat immunity.

9. What factor is important in determining whether the federal government may assert jurisdiction over a terrorist act?
10. Write a brief essay summarizing crimes against the state.

Legal Terminology

combat immunity

crimes against the state

domestic terrorism

espionage

extraterritorial jurisdiction

federal crime of terrorism

Geneva Convention of 1949

international terrorism

material support to a foreign terrorist organization

material support to a terrorist

sabotage

sedition

seditious conspiracy

seditious libel

seditious speech

terrorism transcending national boundaries

treason

weapons of mass destruction

Criminal Law on the Web

Log on to the Web-based student study site at www.sagepub.com/lippmanccl2e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and audio/video links.

1. Read more about John Walker Lindh. Do you agree that John was a victim of media bias?
2. Examine the findings of a Syracuse University study on terrorist prosecutions.
3. Read about contemporary developments in terrorism and in the prosecution of terrorist crimes.

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Chapter 16

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14. 18 U.S.C. § 1992.
15. 49 U.S.C. § 46502.
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Glossary

abandonment—an individual who completely and voluntarily renounces his or her criminal purpose is not liable for an attempt. Abandonment as a result of outside or extraneous factors does not constitute a defense.

abuse excuse—criminal defense that claims a lack of criminal responsibility based on past abuse or experiences.

accessories—parties responsible for the separate and lesser offense of assisting a criminal offender avoid apprehension, prosecution, or conviction.

accessories after the fact—individuals liable for assisting an offender avoid arrest, prosecution, or punishment.

accessories before the fact—individuals under the common law who assist an individual prior to the commission of a crime and who are not present at the scene of the crime.

accomplices—parties liable as principals before and during the commission of a crime.

acquaintance rape—rape committed by a perpetrator who is known to the victim.

actual possession—an object within an individual's immediate physical control or on their person.

actus reus—a criminal act, the physical or external component of a crime.

adultery—consensual sexual intercourse between a male and a female, at least one of whom is married.

affirmative defenses—the burden of production and, in most cases, the burden of persuasion is on the defendant.

agency theory of felony murder—a felon is liable for a murder committed by a co-felon.

aggravated rape—a rape that is more harshly punished based on the use of force, injury to the victim, or the fact that the perpetrator is a stranger, or other factors.

aggravating factors—factors that permit enhancement of an offender's punishment, including an offender's prior record, nature of the offense, and identity of the victim.

aggressor—an individual initiating a physical confrontation is not entitled to self-defense unless he or she retreats.

alter ego rule—an individual intervening in defense of others possesses the rights of the person he or she is assisting.

American bystander rule—no legal duty to assist or to rescue an individual in danger.

American rule for resistance to an unlawful arrest—an individual may not resist an illegal arrest.

appellant—the individual appealing.

appellate courts—intermediate or supreme court of appeals.

appellee—the party against whom an appeal is filed.

arson—willful and malicious burning of the dwelling of another. Modified by statute to encompass any building or structure.

assault and battery—battery is the application of force to another person. An assault may be committed either by attempting to commit a battery or by intentionally placing another in fear of a battery.

assets forfeiture—seizure pursuant to a court order of the "fruits" of illegal narcotics transactions (along with certain other crimes) or of material that was used to engage in such activity.

attempt—an intent or purpose to commit a crime, an act or acts toward the commission of the crime, and a failure to commit the crime.

attendant circumstances—the conditions or context required for a crime.

bench trial—trial before a judge without a jury.

beyond a reasonable doubt—the standard of proof applied in a criminal case; requires that a judge or juror is convinced beyond a moral certainty.

bigamy—marrying another while already having a living spouse.

bilateral—there must be an agreement between at least two persons with the intent to achieve a common criminal objective.

bill of attainder—a legislative act directed against an individual or group of individuals imposing punishment without trial.

Bill of Rights—first ten amendments to the U.S. Constitution.

binding authority—a decision that establishes a precedent.

blackmail—taking property through the threat to disclose secret or embarrassing information.

brain death test—the irreversible function of all brain functions is the point at which an individual is legally dead.

breach of the peace—an act that disturbs or tends to disturb the tranquility of citizens.

bribery of a public official—offering an item of value to an individual occupying an official position to influence a decision or action.

brief—written legal argument submitted to an appellate court; also, to write a summary of a case.

broken windows theory—failing to prevent and punish misdemeanor offenses causes major crimes.

burden of persuasion—responsibility to convince the fact finder, usually beyond a reasonable doubt.

burden of production—responsibility to produce sufficient evidence for the fact finder to consider the merits of a claim.

burglary—breaking and entry of the dwelling house of another at night with

the intention to commit a felony therein. Modified by statute to cover an illegal entry into any structure at any time, day or night, with a criminal intent.

capital felony—punishable by the death penalty or by life imprisonment in states without the death penalty.

capital murder—punishable by the death penalty or life imprisonment and, in non–capital punishment states, by life imprisonment. Also referred to in some states as aggravated murder.

carjacking—taking a motor vehicle in the possession of another, from his or her person or immediate presence, by force, and against his or her will.

case-in-chief—the prosecution's phase of the trial.

castle doctrine—individuals have no obligation to retreat inside their home.

causation—there must be a connection between an act and the resulting prohibited harm.

cause in fact—the defendant must be shown to be the "but for" cause of the harm or injury.

chain conspiracy—a conspiracy in which individuals are linked in a vertical chain to achieve a criminal objective.

child pornography—a juvenile engaged in actual or simulated sexual activity or in the lewd display of genitals.

choice of evils—the defense of necessity in which an individual commits a crime to avoid an imminent and greater social harm or evil.

circumstantial evidence—evidence that indirectly establishes that the defendant possessed a criminal intent or committed a criminal act.

civil commitment—a procedure for detaining psychologically troubled individuals who pose a danger to society.

civil law—protects the individual rather than societal interest.

clemency—an executive governmental official reduces a criminal sentence.

code jurisdiction—acts or omissions are only punishable that are contained in the state criminal code.

coincidental intervening act—a defendant's criminal act results in the victim being at a particular place at a particular time and being impacted by an independent intervening act. The defendant is responsible for foreseeable coincidental intervening acts.

collateral attack—a challenge to a conviction filed following the exhaustion of direct appeals.

combat immunity—individuals meeting standards set forth in the Geneva Convention are to be treated as prisoners of war when apprehended.

common law crimes—crimes developed by the common law judges in England and supplemented by acts of parliament and decrees issued by the king.

common law states—the common law may be applied where the legislature has not acted.

competence to stand trial—a defendant is competent to stand trial if he or she is able to intelligently assist his or her attorney and to follow and understand the trial.

complete attempt—an individual takes every act required to commit a crime and fails to succeed.

computer crime—crimes involving the computer, including unauthorized access to computers, computer programs, and networks; the modification or destruction of data and programs; and the sending of mass unsolicited messages and messages intended to trick and deceive.

concurrence—a criminal intent must trigger and coincide with a criminal act.

concurrent sentences—sentences for each criminal act are served at the same time.

concurring opinion—an opinion by a judge supporting a majority or dissenting opinion, typically based on other grounds.

consecutive sentences—sentences for each criminal act are served one after another.

conspiracy—an agreement to commit a crime. Various state statutes require an overt act in furtherance of this purpose.

constitutional democracy—a constitutional system that limits the powers of the government.

constructive intent—individuals who act in a gross and wantonly reckless fashion are considered to intend the natural consequences of their actions and are guilty of willful and intentional battery or homicide.

constructive possession—an individual who retains legal possession over property that is not within his or her actual control.

cooling of blood—the point at which an individual who has been provoked no longer is acting in response to an act of provocation.

corporate liability—the imposition of vicarious liability on a corporate officer or corporation.

corporate murder—a killing for which a business enterprise is held criminally liable.

corroboration—additional facts that support and lend credibility to the elements of a criminal charge or defense.

crime—conduct that, if shown to have taken place, will result in a formal and solemn pronouncement of the moral condemnation of the community.

crimes against public order and morality—offenses that threaten public peace, quiet, and tranquility.

crimes against the state—treason, sedition, sabotage, espionage, terrorism, and other offenses intended to harm the government.

crimes against the quality of life—misdemeanor offenses that diminish the sense of safety and security in a neighborhood.

crimes of cause and result—the intent to achieve a specific result.

crimes of official misconduct—knowingly corrupt behavior by a public official in exercise of his or her official responsibility.

criminal attempt—comprises an intent or purpose to commit a crime, an act or acts toward the commission of the crime, and a failure to commit the crime.

criminal homicide—all homicides that are neither justified nor excused.

criminal mischief—damage or destruction of tangible property.

criminal procedure—investigation and detection of crime by the police and the procedures used at trial.

criminal trespass—the unauthorized entry or remaining on the land or premises of another.

curtilage—the area immediately surrounding a dwelling that is considered part of the habitation.

custody—temporary and limited right to control property.

cyberstalking—stalking on the computer.

deadly force—use of physical force or a weapon likely to cause death or serious bodily harm.

defendant—individual charged with a crime and standing trial.

defiant trespass—entering or remaining on the property of another after receiving notice that an individual's presence is without the consent of the owner.

depraved heart murder—killing as a result of extreme recklessness, wanton unconcern, and indifference to human life with malice aforethought.

derivative liability—the guilt of a party to a crime based on the criminal acts of the primary party.

determinate sentencing—a sentence fixed by the state legislature.

diminished capacity—mental disease or defect admissible to demonstrate defendant's inability to form a criminal intent, typically limited to murder.

disclose or abstain doctrine—the obligation to either make corporate information public or refrain from trading in the corporation's stock.

disorderly conduct—intentionally or knowingly causing or risking public inconvenience, annoyance, or alarm.

disparity—sentences for a particular offense are not uniform and vary from one another.

dissenting opinion—an opinion by a judge disagreeing with the majority of a multijudge court.

distinguishing precedents—showing why a case differs from existing precedents.

domestic terrorism—a violent or dangerous act occurring within the United States intended to intimidate or coerce the civilian population, to influence government policy by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

double jeopardy—being prosecuted twice for the same crime.

dual sovereignty—sharing of power between federal and state governments. Each has different interests that permit both a state and a federal prosecution for the same crime.

duress—a crime is excused when committed to avoid what is reasonably believed to be the imminent infliction of serious physical harm or death.

Durham product test—a defendant's unlawful act is the product of a mental disease or defect.

duty to intervene—the legal obligation to act.

earnest resistance—a standard of resistance to rape under the common law.

Eighth Amendment—prohibits cruel and unusual punishment.

embezzlement—the fraudulent conversion of the property of another by an individual in lawful possession of the property.

English rule for resistance to an unlawful arrest—an individual may use reasonable force to resist an illegal arrest.

entrapment—defense based on governmental inducement of an otherwise innocent defendant to commit a defense (subjective test) or based on governmental conduct that falls below accepted standards and would cause an innocent individual to commit a criminal offense (objective test).

environmental crimes—crimes that threaten the natural environment, including harm to the air, water, land, and natural resources.

equal protection—the Fifth and Fourteenth Amendments to the U.S. Constitution guarantee individuals equal protection of the law.

espionage—deliver information to a foreign government with the intent or reason to believe that it is to be used to injure the United States or to advantage a foreign government.

European bystander rule—a rule in Europe imposing a legal duty on individuals to assist those in peril.

excusable homicide—individuals are relieved of criminal liability based on lack of criminal intent. This includes insanity, infancy, and intoxication.

excuses—defenses in which defendants admit wrongful conduct while claiming a lack of legal responsibility based on a lack of a criminal intent or the involuntary nature of their acts.

***ex post facto* law**—a law declaring an act criminal following the commission of the act.

extortion—taking property from another by threat of future violence or action, such as circulating secret or embarrassing information; by threat of a criminal charge; or by threat of inflicting economic harm.

extraneous factor—a circumstance that is not created by a defendant that prevents the completion of a criminal act.

extraterritorial jurisdiction—prosecuting crimes outside a country's national boundaries.

extrinsic force—an act of force beyond the effort required to accomplish penetration.

factual impossibility—a criminal act is prevented from being completed because of an extraneous factor.

false imprisonment—intentional and unlawful confinement or restraint of another person.

false pretenses—obtaining title and possession of property of another by a knowingly false representation of a present or past material fact with an intent to defraud that causes an individual to pass title to his or her property.

federal crime of terrorism—one or more violent federal offenses calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct.

federal criminal code—federal criminal statutes.

felony—crime punishable by death or by imprisonment for more than one year.

felony murder—a killing committed during the commission of a felony.

fiduciary relationship—a duty of care owed by a corporate official to the stockholders in a corporation.

fighting words—insulting words causing a breach of the peace.

First Amendment—protects freedom of expression, assembly, and free exercise of religion and prohibits the establishment of a religion.

first-degree murder—intentional and premeditated murder with malice aforethought.

fleeing felon rule—the common law rule permitting deadly force against a felon fleeing the police.

fleeting possession—temporary dominion and control over an object and typically not considered possession for purposes of criminal liability.

Foreign Corrupt Practices Act—illegal for an individual or company to bribe a foreign official in order to gain assistance in obtaining or retaining business.

forgery—creating a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others.

fornication—name of the act when an unmarried person has voluntary sexual intercourse with another individual.

fraud in inducement—misrepresentation in regard to the purpose or benefits of a sexual relationship does not constitute rape.

fraud in the *factum*—misrepresentation in regard to the act to which an individual consents constitutes rape.

***Gebardi* rule**—an individual who is excluded from liability under a criminal statute may not be held legally liable as a conspirator to violate the law.

general deterrence—punishment intended to deter individuals other than the offender from committing a crime.

general intent—an intent to commit an *actus reus*.

Geneva Convention of 1949—international treaty on the law of war providing standards for lawful combatant status.

good motive defense—the fact that a defendant committed a crime for what he or she views as a good reason is not recognized as a defense.

Good Samaritan statute—legislation that exempts individuals from civil liability who assist individuals in peril.

grading—the categorization of homicide in accordance with the "moral blameworthiness" of the perpetrator.

graft—asking, accepting, receiving, or giving a thing of value as compensation or a reward for making an official decision.

grand larceny—a serious larceny, determined by the value of the property that is taken.

gross misdemeanor—punishable by between six and twelve months in prison.

guilty but mentally ill (GBMI)—the defendant found to be guilty and mentally ill at the time of the criminal offense. The defendant is provided with psychiatric care while incarcerated. This is distinguished from a verdict of not guilty by reason of insanity (NGRI).

habeas corpus—an order issued by a court requiring the government to demonstrate that an individual is being legally detained.

hate speech—speech that denigrates, humiliates, and attacks individuals on account of race, religion, ethnicity, nationality, gender, sexual preference, or other personal characteristics and preferences.

head notes—short statements of the important points included in a legal decision.

heat of passion—acting in response to adequate provocation.

holding—the conclusion reached by a judge in a case.

identity theft—stealing of an individual's personal identifying information.

ignorantia lexis non excusat—ignorance of the law is no excuse.

immorality crimes—prostitution, obscenity, bigamy, and other offenses against the moral order.

imperfect self-defense—an honest, but unreasonable belief in the justifiability of self-defense that results in a conviction for manslaughter rather than murder.

incapacitation—a theory of punishment that protects the public by incarcerating offenders.

inchoate crimes—attempts, conspiracy, and solicitation. Each requires a specific purpose to accomplish a criminal objective and an act in furtherance of the intent. These offenses are punished to the same extent or to a lesser extent than the target crime.

incitement to violent action—words provoking individuals to breach the peace.

incomplete attempt—an individual abandons or is prevented from completing an attempt due to an extraneous or intervening factor.

incorporation theory—the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution is interpreted to include most of the rights contained in the Bill of Rights and extends these protections to the states.

indecent exposure—an act of public indecency.

indeterminate sentencing—the state legislature provides judges with the ability within certain limits to set a minimum and maximum sentence. The offender is evaluated while imprisoned by a parole board.

infamous crimes—deserving of shame or disgrace.

infancy—at common law there was an irrebuttable presumption that children younger than seven lack criminal intent. In the case of children older than seven and younger than fourteen, there was a rebuttable presumption of a lack of capacity to form a criminal intent. Individuals older than fourteen were considered to possess the same capacity as an adult.

infractions—punishable by a fine.

inherent impossibility—an act that is incapable of achieving the desired result.

insanity defense—a legal excuse based on a mental disease or defect.

insider trading—use of confidential corporate information to buy or sell stocks.

intermediate level of scrutiny—classifications based on gender must be factually related to differences based on gender and must be substantially related to the achievement of a valid state objective.

international terrorism—a violent or dangerous act occurring outside the United States intended to intimidate or coerce the civilian population, to influence government policy by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

Interstate Commerce Clause—constitutional power of U.S. Congress to regulate commerce among the states.

intervention in defense of others—the privilege to exercise self-defense on behalf of an individual in peril.

intrinsic force—the amount of force required to achieve penetration.

intervening cause—a cause that occurs between the defendant's criminal act and a social harm.

involuntary act—unconscious act or automatism.

involuntary intoxication—a defense to criminal offenses where the defendant meets the standard for mental illness in the state.

involuntary manslaughter—killing of another as a result of gross negligence, recklessness, or during the commission of an unlawful act.

irresistible impulse—mental disease that causes the defendant to lose the ability to choose between right and wrong and avoid engaging in criminal acts.

joint possession—several individuals exercise dominion and control over an object.

jury nullification—right of a jury to disregard the law and to acquit a defendant.

just deserts—offender receives sentence that he or she deserves.

justifiable homicide—murder is justified under the circumstances; this includes self-defense, police use of deadly force, and the death penalty.

justification—a defense based on the circumstances of a criminal act.

keeping a place of prostitution—the crime of using a building for prostitution.

kidnapping—the unlawful, nonconsensual, and forcible asportation of an individual.

knowingly—awareness that conduct is practically certain to cause a result.

knowing possession—individual awareness of criminal possession.

larceny—trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the individual of possession of the property.

larceny by trick—obtaining possession by misrepresentation or deceit.

last step approach—common law approach to attempt that requires the last step to the completion of a crime.

legal impossibility—the defense that an individual's act does not constitute a crime as a matter of law.

legal reporters—books containing the published opinions of judges.

lewdness—willful exposing of the genitals of one person to another in a public place for purposes of sexual arousal or gratification.

libel—a civil action for words that harm an individual's reputation.

living off prostitution—being knowingly supported in whole or in substantial part by the proceeds of prostitution.

loitering—standing in public with no apparent purpose.

mail fraud—knowing and intentional participation in a scheme or artifice intended to obtain money or property through the use of the mails to execute the scheme.

majority opinion—the decision of a majority of the judges on a multiple judge panel.

make my day law—a statute that authorizes any degree of force against a trespasser who uses or threatens to use even slight force against the occupant of a home.

mala in se—crimes that are inherently evil.

mala prohibita—crimes that are not inherently evil.

malice aforethought—an intent to kill with ill will and hatred.

mandatory minimum sentences—the legislature requires judges to sentence an offender to a minimum sentence, regardless of mitigating factors. Prison sentences may be reduced by good-time credits while incarcerated.

manslaughter—killing of another without malice aforethought and without excuse or justification.

masturbation for hire—crime of stimulating the genitals of another.

material support to a foreign terrorist organizations—providing material support or resources to a foreign terrorist organization or an attempt or conspiracy to do so.

material support to terrorists—providing support or resources or concealing the nature, location, source, or ownership of material support or resources, knowing or intending that the material is to be used in terrorist acts.

mayhem—depriving another individual of a member of his or her body or disfiguring or rendering it useless.

Megan's Law—sexually violent offender registration laws are named in memory and honor of Megan Kanka, a seven-year-old New Jersey child who was sexually assaulted and murdered by a neighbor in 1994.

mens rea—the mental element of a crime.

mere possession—unknowing possession.

mere presence rule—an individual's presence at the scene of a crime generally does not satisfy the *actus reus* requirement for accomplice liability.

minimum level of scrutiny test—law presumed constitutional so long as reasonably related to a valid state purpose.

misappropriation doctrine—an individual is prohibited from using inside information obtained from a firm or corporation to trade in another corporation's stock.

misdemeanant—individual charged with a misdemeanor.

misdemeanor—punishable by less than a year in prison.

misdemeanor manslaughter—the unintentional killing of another during the commission of a criminal act that does not amount to a felony.

mistake of fact—defense based on mistake of fact that negates a specific criminal intent, knowledge, or purpose.

mistake of law—an error of law, with isolated exceptions, is not a defense.

mitigating circumstances—factors that may reduce or moderate the sentence of a defendant convicted at trial.

M'Naghten test—a disease or defect of the mind that results in an individual's either not knowing what he or she was doing was right or wrong or not knowing what he or she was doing.

Model Penal Code—an influential criminal code drafted by prominent academics, practitioners, and judges affiliated with the American Law Institute to encourage state legislatures to adopt a uniform approach to the criminal law.

money laundering—financial transaction involving proceeds or property derived from unlawful activity.

multiple judge panel—a judicial tribunal with three or more judges.

murder—killing of another with malice aforethought and without excuse or justification.

natural and probable consequences doctrine—a person encouraging or facilitating the commission of a crime will be held liable as an accomplice for the crime he or she aided and abetted as well as for crimes that are the natural and probable outcome of the criminal conduct.

necessity defense—a criminal act is justified when undertaken to prevent an imminent, immediate, and greater harm.

negligently—a failure to be aware of a substantial and unjustifiable risk that constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

negligent manslaughter—negligent manslaughter arises when an individual commits an act that he or she is unaware creates a high degree of risk of human injury or death under circumstances in which a reasonable person would have been aware of the threat.

nolo contendere—a plea that has the legal effect of a plea of guilty, but does not constitute an admission of guilt in proceedings outside of the immediate trial.

nondeadly force—use of physical force or weapon that is not likely to cause death or serious injury.

nullum crimen sine lege, nulla poena sine lege—no crime without law, no punishment without law.

obiter dicta—observations from the bench.

objective approach to criminal attempt—requires an act that is very close to the completion of the crime.

objective test for intervention in defense of others—a person intervening in defense of others may intervene where a reasonable person would believe a person is in need of assistance.

obscenity—description or representation of sexual conduct that, taken as a whole by the average person applying contemporary community standards, appeals to the prurient interest in sex. Sex is portrayed in a patently offensive way and lacks serious literary, artistic, political, or scientific value when taken as a whole.

Occupational Safety and Health Act—a federal law protecting workplace safety.

omission—failure to act or to intervene to assist another.

oral argument—arguments before an appellate court.

overbreadth—a statute that is unconstitutionally broad and punishes both unprotected speech or conduct and protected speech or conduct.

overt act—an overt act in furtherance of an agreement is required under most modern conspiracy statutes.

pandering—encouraging and inducing another to remain a prostitute.

pardon—exempts an individual from additional punishment.

parental responsibility laws—statutory rule that parents are responsible for the criminal acts of their children.

parties to a crime—individuals liable for assisting another to commit a crime.

perfect self-defense—an honest and reasonable belief that constitutes a complete defense to a criminal charge.

per curiam—an opinion authored by the entire court, literally "for the court."

persuasive authority—a decision that a court may consult to assist in a judgment that does not constitute binding authority.

petitioner—an individual filing a collateral attack on a verdict following the exhaustion of direct appeals.

petit larceny—a minor larceny, typically involving the taking of property valued at less than a designated monetary amount.

petty misdemeanor—punishable by less than six months in prison.

physical proximity test—an act constituting an attempt must be physically proximate to the completion of the crime.

pimping—procuring a prostitute for another.

Pinkerton rule—a conspirator is liable for all criminal acts taken in furtherance of the conspiracy.

plea bargain—negotiated agreements between the defense attorney and prosecutor and often approved by a judge.

plurality opinion—a judicial opinion that represents the views of the largest number of judges on a court, although short of a majority. The plurality opinion is typically combined with a concurring opinion to constitute the court majority.

plurality requirement—a conspiracy requires an agreement between two or more parties.

police power—duty to protect the well-being and tranquility of the community.

possession—physical control over property with the ability to freely use and enjoy the property.

precedent—a judicial opinion that controls the decision of a court presented with the same issue. A court may conclude that a precedent does not fully fit the case it is adjudicating and distinguish the case before it from the existing precedent.

preemption doctrine—federal law is superior to state law in areas reserved to the national government.

premeditation and deliberation—the standard for first-degree murder involving planning and reflecting on a killing. Premeditation may occur instantaneously.

preparation—acts taken to prepare for committing a crime.

preparatory offense—a crime that is a step toward an even more serious offense.

preponderance of the evidence—the standard of proof in a civil case. The facts are probably more in favor of one side than the other.

presumption of innocence—an individual is presumed to be not guilty and the burden is on the government to establish guilt.

presumptive sentencing guidelines—a legislatively established commission establishes a sentencing formula based on various factors, including the nature of the crime and offender's criminal history. Judges may be strictly limited in terms of discretion or may be provided with some flexibility within established limits to depart from the presumptive sentence.

principals in the first degree—common law term for the actual perpetrator of a crime.

principals in the second degree—common law term for individuals who are present at the crime scene and assist in the crime.

privacy—the constitutional right to be free from unjustified governmental intrusion into the sphere of personal autonomy.

promoting prostitution—aiding or abetting prostitution.

prompt complaint—a rape victim at common law was required to lodge an immediate report of a rape.

proportionality—a sentence should "fit the crime."

prosecutrix—a victim or complainant in a rape prosecution.

prostitution—soliciting or engaging in sexual activity in exchange for money or other consideration.

proximate cause—the legally responsible cause of a criminal harm; may involve policy considerations.

proximate cause theory of felony murder—a felon is liable for all foreseeable results of the felony.

public indecencies—public drunkenness, vagrancy, loitering, panhandling, graffiti, and urinating and sleeping in public.

public welfare offense—regulatory offenses carrying fines that typically do not require a criminal intent.

purposely—a conscious intent to cause a particular result.

rape shield laws—the prosecution may not introduce evidence relating to the victim's sexual relations with individuals other than the accused and may not introduce evidence pertaining to the victim's reputation for chastity.

rape trauma syndrome—a psychological and medical condition common among victims of rape.

rational basis test—a law is presumed valid so long as it is reasonably related to a valid state purpose.

reasonable person—the ideal type of the balanced and fair individual.

reasonable resistance—resistance to rape that is objectively reasonable under the circumstances.

reasoning—an explanation of a judge's thinking in reaching a decision.

rebuttal—the defense case at trial.

receiving stolen property—accepting stolen property knowing it to be stolen with the intent to permanently deprive the owner of the property.

reception statutes—a state receives the common law as an unwritten part of a state's criminal law.

recklessly—conscious disregard of a substantial and unjustifiable risk that constitutes a gross deviation from the standard of conduct that a law-abiding person would observe in the defendant's situation.

recklessness—an individual is personally aware that his or her conduct creates a substantial risk of death or serious bodily harm.

rehabilitation—punishment intended to reform offenders and to transform them into law-abiding members of society.

relevant—evidence that assists in establishing a material fact of the crime.

res ipsa loquitur—"the thing speaks for itself." A test for attempt that asks whether an ordinary individual observing the acts of another would conclude that the individual intends to commit a crime.

resist to the utmost—at common law, a rape victim was required to demonstrate a determined resistance to the rape.

respondent—an individual against whom a collateral attack is directed.

responsive intervening act—a defendant's criminal act leads to an act undertaken by the victim in reaction to the threat. An unforeseeable and abnormal responsive act limits the defendant's criminal liability.

restoration—stresses the harm caused by crime to victims and requires offenders to engage in financial restitution and community service to compensate the victim and the community and to "make them whole once again."

result crime—requires that the act cause a very specific harm and requires a specific intent.

retreat—withdrawal from a conflict while indicating a desire to avoid a confrontation.

retreat to the wall—obligation to withdraw as fully as possible before resorting to self-defense.

retribution—offender receives the punishment that he or she deserves.

riot—group disorderly conduct by three or more persons.

robbery—taking personal property from an individual's person or presence by violence or intimidation.

rout—three or more persons taking steps toward the creation of a riot.

rule of legality—individual may not be punished for an act that was not criminally condemned in a statute prior to the commission of the act.

sabotage—during a time of war or national emergency, the willful injury to war material, premises, or utilities with the intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying out the war or defense activities. During peacetime, sabotage requires an intent to injure, interfere with, or obstruct the national defense of the United States.

Sarbanes-Oxley Act—a securities fraud statute that requires corporate executive officers to certify that corporate financial statements are accurate.

scienter—guilty knowledge.

second-degree murder—intentional killing of another with malice aforethought.

sedition—any communication intended or likely to bring about hatred, contempt, or disaffection with the constitution or the government.

seditious conspiracy—an agreement to overthrow or destroy a government by force.

seditious libel—writing intended or likely to bring about hatred, contempt, or dissatisfaction with the constitution or the government.

seditious speech—verbal communications intended or likely to bring about hatred, contempt, or disaffection with the constitution or the government.

selective incapacitation—singles out repeat offenders and other dangerous individuals for lengthy incapacitation.

self-defense—a justification defense that recognizes the right of an individual to defend himself or herself against an armed attack.

Sherman (Antitrust) Act of 1890—criminal punishment of contracts, combinations, and conspiracies in restraint of interstate commerce.

simulation—punishes the creation of false objects with the purpose to defraud, such as antique furniture, paintings, and jewelry. Simulation requires proof of a purpose to defraud or proof that an individual knows that he or she is "facilitating a fraud."

social host liability laws—liability for serving or providing alcohol to minors in the event of an accident or injury.

Socratic method—use of question and answer technique in teaching.

solicitation—a written or spoken statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another person to commit a crime with the purpose that the other individual commit the crime.

solicitation for prostitution—requesting another person to engage in an act of prostitution.

Son of Sam laws—prohibits offenders from profiting from their crime.

specific deterrence—punishment intended to deter or discourage an offender from committing another crime.

specific intent—a mental determination to accomplish a specific result.

stalking—following another person or placing another person under surveillance.

stand your ground rule—no requirement to retreat.

stare decisis—precedent.

status offense—offense based on personal characteristics or condition rather than conduct that constitutes cruel and unusual punishment.

statutory rape—strict liability offense of intercourse with an underage individual.

strict liability—a crime that does not require a criminal intent.

strict scrutiny—the state has the burden of demonstrating that a law employing a racial or ethnic classification is strictly necessary to accomplish a valid objective.

subjective approach to criminal attempt—requires an act toward the

commission of a crime that is sufficient to establish a criminal intent. The act is not required to be proximate to the completion of the crime.

substantial capacity test—a person is not responsible for criminal conduct, if, at the time of such conduct, as a result of mental disease or defect, the person lacks substantial capacity either to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of law.

substantial step test—the Model Penal Code approach to deter mining attempt. There must be a clear step toward the commission of a crime that is not required to be immediately proximate to the crime itself. The act must be committed under circumstances strongly corroborative of an intent to commit a crime.

substantive criminal law—specific crimes, defenses, and general principles.

Supremacy Clause—the clause in the U.S. Constitution that provides that federal laws take precedence over state laws.

tactical retreat—an individual withdraws from a conflict while intending to continue the physical conflict.

tangible property—physical property, including personal property and real property. Distinguished from intangible property.

teen party ordinances—ordinances that make it an offense to hold a party at which minors are served alcohol.

terrorism transcending national boundaries—terrorism occurring partly within and partly outside the United States.

theft statute—consolidated state law punishing larceny, embezzlement, and false pretenses.

Three Strikes and You're Out law—provide mandatory sentences for individuals who commit a third felony after being previously convicted for two serious or violent felonies. Also, stringent penalties are typically provided for a second felony.

tippees—individuals who receive insider information.

tippers—individuals who provide insider information.

tort—civil action for injury to an individual or to his or her property.

transferred intent—what occurs when the intent to harm one individual is transferred to another.

Travel Act—interstate or foreign travel or use of the mails or of a facility in interstate or international commerce with the intent to distribute the proceeds of any specified unlawful activity or violence or to promote a specified unlawful activity and thereafter to commit or attempt to commit a crime.

treason—levying war or giving aid and comfort to the enemy.

trial de novo—a new trial before an appellate court.

trial transcript—the written record of trial proceedings.

true man—an individual without fault who is able to rely on self-defense.

true threats—threats of bodily harm directed against an individual or a group of individuals.

truth in sentencing laws—laws that provide that offenders must serve a significant portion of their criminal sentences.

unequivocality test—a test for attempt that asks whether an ordinary individual observing a person's acts would determine that the person intends to commit a crime.

unilateral—an individual with the intent to enter into a conspiratorial agreement is guilty regardless of the intent of the other party.

unlawful assembly—a gathering of at least three individuals for the purpose of engaging or preparing to engage in conduct likely to cause public alarm.

uttering—circulating or using a forged document.

vagrancy—wandering the street with no apparent means of earning a living.

vehicular manslaughter—killing resulting from the grossly negligent operation of a motor vehicle or resulting from driving while intoxicated.

vicarious liability—holding an individual or corporation liable for a crime committed by another based on the nature of the relationship between the parties.

victim impact statement—victim or victim's family may address the court at sentencing.

violation—minor crimes punishable by fines and not subject to imprisonment. Also called infractions.

void for vagueness—a law violates due process that fails to clearly inform individuals of what acts are prohibited and/or fails to establish clear standards for the police.

voluntary act—the individual is aware and fully conscious of acting. This is distinguished from an involuntary act, unconscious act, or automatism.

voluntary intoxication—defendant not held liable for an offense involving "knowledge or purpose." Increasingly not recognized as a defense.

voluntary manslaughter—instantaneous killing of another in the heat of passion in response to adequate provocation without a "cooling of blood."

weapons of mass destruction—toxic or poisonous chemical weapons, weapons involving biological agents, explosive bombs, or weapons releasing radiation or radioactivity at a level dangerous to human life.

Wharton's rule—an agreement by two persons to engage in a criminal act that requires the involvement of two persons cannot constitute a conspiracy.

wheel conspiracy—a conspiracy in which a single individual or individuals serve as a hub that is connected to various individuals or spokes.

white-collar crime—crimes committed by an individual of high status in the course of his or her occupation. The U.S. Justice Department defines white-collar crime as an illegal act that employs deceit and concealment rather than the application of force to obtain money, property, or service, to avoid the payment or loss of money, or to secure a business or professional advantage.

willful blindness—knowledge is imputed to individuals who consciously avoid awareness in order to avoid criminal responsibility.

wire fraud—knowing and intentional participation in a scheme or artifice intended to obtain money or property through the use of interstate wire communication.

withdrawal in good faith—individuals involved in a fight may gain the right of self-defense by clearly communicating that they are retreating from the struggle.

withdrawal of consent—an individual who initially consents to sexual penetration may change his or her mind.

writ of certiorari—a writ or order issued by the U.S. Supreme Court assuming jurisdiction over an appeal. Four judges must vote to review a case.

year-and-a-day rule—common law requirement, being abandoned by many states, that limits liability for homicide to a year and a day.

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About the Author

Matthew Lippman has taught criminal law and criminal procedure in the Department of Criminology, Law, and Justice at the University of Illinois at Chicago (UIC) for more than twenty years. He has also taught courses on civil liberties, law and society, and terrorism and teaches international criminal law at John Marshall Law School in Chicago. He earned a doctorate in political science from Northwestern University and a master of law from Harvard Law School and is a member of the Pennsylvania Bar. He has been voted by the graduating seniors at UIC to receive the Silver Circle Award for outstanding teaching on six separate occasions and has also received the UIC Flame Award from the University of Illinois Alumni Association, as well as the Excellence in Teaching Award, Teaching Recognition (Portfolio) Award, and Honors College Fellow of the Year Award. The university chapter of Alpha Phi Sigma, the criminal justice honors society, named him "criminal justice professor of the year" on three occasions. In 2008, Professor Lippman was named College of Liberal Arts and Sciences Master Teacher. He is also recognized in *Who's Who Among America's Teachers*.

Professor Lippman is author of more than a hundred articles and four books. These publications focus on criminal law and criminal procedure, international human rights, and comparative law. He is the author of a forthcoming textbook on criminal procedure. His work is cited in hundreds of academic publications and by international courts and organizations. He has served on legal teams appearing before the International Court of Justice in The Hague, has testified as an expert witness on international law before numerous state and federal courts, and has consulted with both private organizations and branches of the U.S. government. He regularly appears as a radio and television commentator and is frequently quoted in leading newspapers. He has served in every major administrative position in the Department of Criminology, Law, and Justice, including Department Head and Directors of Undergraduate and Graduate Studies.